The European Union and the Social Dimension of Globalization

How the EU influences the world

Edited by
Jan Orbie and **Lisa Tortell**



Routledge/GARNET series: Europe in the World

The European Union and the Social Dimension of Globalization

This volume provides a comprehensive account of the European Union's social role in the world, assessing the EU's ability to shape the social aspect of globalization from both law and political science perspectives.

Focusing explicitly on the EU, the authors address the extent of coherence between the Union's international social objectives compared with the activities of the International Labour Organization (ILO) and with other EU foreign policy goals. Various dimensions of Europe's global social role are addressed, including:

- the social dimension of EU trade relations
- the involvement of civil society in EU development policies
- the linkage between the EU's internal and external 'social model'
- the export of Europe's social *acquis* through enlargement and neighbourhood policies
- the EU's international position on health, gender equality, children's rights and corporate social responsibility
- the role of the Union in the ILO

The European Union and the Social Dimension of Globalization will be of great interest to students and researchers in EU studies, globalization studies and social policy.

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Preface

The European Union has committed itself to promoting the social dimension of globalization. European policy-makers emphasize that several aspects of the European social model, which ensures that social and economic aims go hand in hand, could be exported to the world scene. Since the beginning of this millennium, the Union has embarked upon a broad approach to promoting labour standards internationally.

This exploratory book provides a comprehensive account of the EU's new initiatives in this area. It examines the Union's ability in shaping the social aspect of globalization from both law and political science perspectives. More specifically, it assesses the extent of coherence between the Union's international social objectives, compared with the activities of the International Labour Organization (ILO) and with other EU foreign policy goals.

The contributions to this book address various dimensions of Europe's social role in the world, such as the linkage between the EU's internal and external 'social model', the export of Europe's social *acquis* through enlargement and neighbourhood policies, the social dimension of EU trade relations, the international promotion of children's rights by the EU, Europe's international health policies, the role of the Union in the ILO, the involvement of civil society in EU development policies, gender equality in EU external policies and the EU's international position on corporate social responsibility.

The conclusions suggest that the EU has developed a relatively coherent approach to the social dimension of globalization. However, certain critical observations about the nature of Europe's reinvigorated relationship with the ILO are also evident, as well as a tension between market-oriented and social objectives.

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Abbreviations

ACP	Africa Caribbean and Pacific group
AEAC	Andean Employers Advisory Council
AESC	Andean Economic and Social Committee
ALAC	Andean Labour Advisory Council
CAN	Andean Community
CAS	(ILO) Conference Committee on the Application of Standards
CEACR	(ILO) Committee of Experts on the Application of Conventions and Recommendations
CFA	(ILO) Committee on Freedom of Association
CFSP	Common Foreign and Security Policy
CCFSRW	Community Charter of the Fundamental Rights of Workers 1989
CLS	Core labour standards
COREPER	Committee of Permanent Representatives
CSO	Civil society organization
CSP	Country strategy paper
CSR	Corporate social responsibility
DCI	Development co-operation instrument
DG	(European Commission) Directorate General
EB	Executive board
EC	European Community
ECHR	European Convention on Human Rights 1950
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EDCTP	European and Developing Countries Clinical Trials Partnership
EDF	European Development Fund
EEA	European Economic Area
EEC	European Economic Community
EES	European Employment Strategy
EESC	European Economic and Social Committee
EFTA	European Free Trade Association
EIDHR	European Instrument for Democracy and Human Rights
EMAA	Euro-Mediterranean Association Agreements
EMSF	European MultiStakeholder Forum

EMP	Euro-Mediterranean Partnership
EMU	European Monetary Union
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
EPA	Economic Partnership Agreement
EP	European Parliament
EPC	European political co-operation
ESDP	European Security and Defence Policy
ETUC	European Trade Union Confederation
EU	European Union
EUCFR	European Union Charter of Fundamental Rights 2000
FCTC	Framework Convention on Tobacco Control
FFCC	Fact-Finding and Conciliation Commission on Freedom of Association
GATT	General Agreement on Tariffs and Trade
GBL	Gender budget line
GDP	Gross domestic product
GEA	Global employment agenda
GFP	Gender focal person
GNI	Gross national income
GSP	Generalized system of preferences
IFI	International financial institution
ILC	International Labour Conference
ILO	International Labour Organization
IMEC	Industrialized market economy countries
IMF	International Monetary Fund
INB	International negotiating bodies
IR	International relations
ITO	International Trade Organization
JAP	Joint assessment paper
LA	Latin America
LAC	Latin America and the Caribbean
MDG	Millennium development goals
MLC	(ILO) Maritime Labour Convention, 2006
NAP	National action plan
NGO	Non-governmental organization
NIP	National indicative programme
NMS	(EU) New member states
NSA	Non-state actor
ODA	Official development assistance
OECD	Organization for Economic Co-operation and Development
OMC	Open method of co-ordination
PCA	Partnership and co-operation agreement
PCD	Policy coherence for development
PRD	Poverty-related disease

PRSP	Poverty Reduction Strategy Paper
RoC	Rights of the child
SIA	Sustainability impact assessment
SME	Small and medium-sized enterprises
TAIEX	Technical Assistance and Information Exchange
TAN	Transnational advocacy networks
TDCA	Trade Development and Co-operation Agreement
TRIPS	Trade-related intellectual property rights
UN	United Nations
WCSDG	World Commission on the Social Dimension of Globalization
WHA	World Health Assembly
WIDE	Network Women in Development Europe
WHO	World Health Organization
WSSD	World Summit on Social Development
WTO	World Trade Organization

1 From the social clause to the social dimension of globalization

Jan Orbie and Lisa Tortell

> We aim at shaping globalization in the interests of all our citizens, based on our common values and principles.
>
> European Council (2007)

The European Union (EU)[1] clearly aspires to play an active role in harnessing globalization in line with its interests and values as the quote above illustrates. The European Council Declaration on Globalization emphasizes the importance of multilateral co-operation in international domains such as climate change and energy, financial markets, trade relations, sustainable development, and global security and migration. It concludes that globalization is 'a source of opportunity rather than a threat', and that 'we will continue building a stronger Union for a better world'.

This book examines the EU's ability in shaping the social aspect of globalization. In particular, it focuses on the promotion of labour standards internationally, although broader external policy objectives such as development, democracy and human rights are also addressed. In various policy documents, the Union has committed itself to promoting the social dimension of globalization.[2] It is argued that the EU could export several elements of the European social model, which ensures that social and economic aims go hand in hand, to the world scene. In this respect, the harmonious relationship between the activities of the International Labour Organization (ILO) and the EU are emphasized (European Commission and ILO 2004).

In this introductory chapter, we will define the subject matter and situate it within the existing literature on European external relations. We will explain why this research project mainly focuses on the international promotion of labour standards by the EU. An outline of the EU's role in relation to the social dimension of globalization will be given, arguing that Europe has shifted from a rather narrow approach of promoting core labour standards through trade policies to a broader and more ambitious international social agenda. The question of whether the Union has been successful in this respect is addressed in the different contributions to this volume. More specifically, we will evaluate the enhanced co-operation between the EU and the ILO (multilateral coherence) and the potential tension between external social and other objectives (horizontal coherence). Based on

these findings, the concluding section makes a preliminary assessment of the EU's role as a normative power in advancing the social dimension of globalization.

Europe's global social role

This book is about the EU's social role in the world, considering EU policies aiming to promote social objectives globally. It concerns, therefore, the social dimension of Europe's international policies and not the impact of globalization on the EU itself.[3] The contributions to this book address various dimensions of Europe's social role in the world, such as the international promotion of children's rights by the EU, gender equality in EU external policies, the involvement of civil society in EU development policies, the EU's international position on corporate social responsibility, the social dimension of European Union trade relations, Europe's international health policies, the export of Europe's social *acquis* through enlargement and neighbourhood policies, the role of the Union in the ILO and the linkage between the EU's internal and external 'social model'.

Towards a definition

The EU has repeatedly declared its commitment to promote the social dimension of globalization, but a precise definition of the term is not obvious. Defining the scope and nature of the 'social dimension' of EU external policies is difficult for two main reasons. First, 'global social policy' is not a circumscribed external policy domain in EU treaties and institutional architecture, as is the case with EU external trade, development or foreign and security policy. To the extent that there is an EU social policy, it largely concerns an *intra-EU* policy domain where many social issues fall under member state rather than EC competences.[4] Second, 'international social goals' are basically *horizontal* foreign policy objectives, and are thus (potentially) pursued through a number of EU external policy instruments. In any event, it is difficult to define the content of 'social', which is often vaguely and broadly defined to encompass a whole range of normative foreign policy objectives such as redistributive policies, development relations, human rights, democracy promotion, good governance or non-economic policies in general.

If 'social' is difficult to define, is the 'social dimension of globalization' any easier? 'Globalization' itself is a complex and evocative concept with a myriad of meanings, commonly understood as encompassing the liberalization of international trade, the expansion of foreign direct investment and the emergence of cross-border financial flows.[5] The term usually refers to economics, but also includes cultural, political and social aspects. Attempting to define the social side of globalization is an even more fluid process.

Focusing on labour rights

It is reasonable, in searching for a definition, to turn to the report of the ILO World Commission on the Social Dimension of Globalization (WCSDG).

The Commission was established by the ILO in February 2002 as an independent body and released its report in 2004 (WCSDG 2004).[6] The WCSDG is best understood as part of an evolution in ILO programmes and activities that can be traced to the 1995 Copenhagen World Summit for Social Development, and includes most notably the ILO Declaration on Fundamental Rights and Principles at Work, 1998 and the 1999 decent work agenda.[7]

The Copenhagen Summit was the first intergovernmental meeting on human and social development, putting 'the needs, rights and aspirations of people at the centre' of decisions and actions.[8] The Summit was convened out of concern at globalization, and the resulting Declaration and Programme of Action included a focus on four fundamental labour standards and brought the role of the ILO to centre stage.[9] The commitment to fundamental labour standards was a 'key element' of the Summit's Declaration (Charnovitz 2000: 151) and, together with developments in the World Trade Organization (WTO) in 1996,[10] provided the impetus for the ILO's 1998 Declaration (Charnovitz 2000: 151–63; ILO 2002: 3).

The Declaration places an emphasis on the priority set of core labour standards (CLS) abstracted from the Conventions, as first set out in the Copenhagen Summit (see Table 1.1 for the fundamental principles and corresponding conventions). Members are considered to be bound by these principles regardless of their ratification record. In 1999, the ILO introduced its decent work initiative: the vision of Juan Somavia, the new Director General (DG) of the ILO, was to develop a 'set of objectives that can be explained to the public' (Charnovitz 2000: 163). CLS and the decent work agenda have now become, to some extent, shorthand ways of describing the ILO's work, and are integral to the way in which the ILO's work has become central to the debate about the social dimension of globalization internationally.

The WCSDG itself bypassed the difficulties in defining the social dimension of globalization and considered it in its widest sense, as being about more than jobs, health and education and involving people's 'aspirations for democratic participation and material prosperity' (WCSDG 2004: vii). There is a need to integrate social considerations into programmes and strategies for economic development in order to limit the potential negative social results of economic globalization and to ensure that the undoubted benefits are evenly distributed. In its widest sense, therefore, the social dimension of globalization concerns the effects on people and societies of the globalization of economic systems internationally.

This book takes the work of the WCSDG as a starting point, but largely focuses on the issue of labour for a number of reasons. First of all, work and labour standards are perhaps the core of social policy. They are the obvious starting point for a definition of 'social' in everyday life: the concern with rights at work, the nature of work and the ability to earn a sufficient amount to ensure a 'sustainable livelihood'[11] is crucial to individuals' aspirations for themselves and their families. Work and employment are inevitably affected by the economic and social impacts of globalization on regions, countries and individuals.

Second, and most importantly, the ILO is clearly the key international institution working on the social dimension of globalization, with the work of the

WCSDG defining the topic. The WCSDG's expectation that the attainment of decent work and CLS (see Table 1.1) would ensure the equal distribution of the benefits of globalization has become a defining feature of modern ILO work. The ILO's influence has been great, in turn, on the approach to the social dimension of globalization debate taken by international institutions, so much so that the ILO's decent work agenda and CLS have been accepted as integral components of the global governance of the issue.[12]

This is very clear in relation to the EU and the social dimension of globalization. EU documents on the social dimension of globalization have emphasized the role of the ILO, its decent work agenda and CLS. As a result of the World Commission report, and mindful of the critical role played in this topic by employment and work, the ILO is a key player in relation to the social dimension of globalization and, accordingly, an important partner for the EU in this regard.

Therefore, this book takes a narrower approach to the 'social dimension of globalization' than the definition suggested by the WCSDG. The contributions mainly focus on the role of labour standards in the Union's external relations and on Europe's relationship with the ILO. However, these issues are not studied in isolation, and broader issues such as health, human rights, development and the involvement of civil society are also considered. Moreover, we examine these issues from various perspectives (human rights and international labour law, political science, international relations), geographical dimensions (European neighbourhood and global level), policy domains (trade, development, corporate social responsibility) and international organizations (ILO and WHO). The findings of each chapter are situated within the general literature on European external relations – which has not yet delved fully into this specific topic.

Table 1.1 Core labour standards and fundamental conventions

Fundamental principles	*Corresponding fundamental conventions*
Freedom of association and the effective recognition of the right to collective bargaining	● Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ● Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
Elimination of all forms of forced or compulsory labour	● Forced Labour Convention, 1930 (No. 29) ● Abolition of Forced Labour Convention, 1957 (No. 105)
Effective abolition of child labour	● Minimum Age Convention, 1973 (No. 138) ● Worst Forms of Child Labour Convention, 1999 (No. 182)
Elimination of discrimination in respect of employment and occupation	● Equal Remuneration Convention, 1951 (No. 100) ● Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Gap in the literature

There is no comprehensive account of Europe's global social role in the literature on European foreign policy. The topic remains one that is largely discussed by policy-makers and civil society, rather than by academics.[13] Two exceptions to this general statement from legal scholars are work by Clapham and Martignoni (2006) and Novitz (2005), and an important exception from political science is a report written by Bob Deacon (1999) on 'socially responsible globalization: a challenge for the European Union'. Deacon takes a broad approach to the topic and analyses the Union's development aid policies and its role in international financial institutions. He identifies the seeds of many of those initiatives that have developed since 2000. As Deacon (1999: 19) himself stated: 'In terms of social policy there are recent signs that the Commission is concerned to inject a more systematic approach and a more assertive approach into what it has called the external dimension of European Social Policy'. Considering the great developments in the politics and policy on the topic since then, it is clearly timely for a directed consideration of the topic to be undertaken.

The EU external relations literature provides the intellectual context without addressing the EU's external role in relation to the social dimension of globalization directly. A growing number of political science scholars, for example, have highlighted the EU's international role, including its normative objectives, by addressing particular external policy domains (e.g. Marsh and Mackenstein 2005; Bretherton and Vogler 2006; Elgström and Smith 2006; Orbie 2008), the Union's role in international organizations (Jörgensen 2008; Laatikainen and Smith 2006), its foreign policy objectives (Smith 2003; Lucarelli and Manners 2006; Mayer and Vogt 2006) or the nature of the Union's international role (Telò 2006; Sjursen 2007).

Other work addresses specific aspects of the EU's approach to the social dimension of globalization rather than providing a comprehensive overview. For example, Lister and Carbone (2006) have written on gender and civil society in EU external relations, a number of scholars have written on EU trade and development policies (Holland 2002; Young 2002; Arts and Dickson 2004; Meunier 2006; Carbone 2007; Faber and Orbie 2007), the EU's role in promoting CLS from a legal perspective (Murray 2001; Novitz 2003), the impact of globalization on work in the EU (Anderton *et al.* 2006; Eyraud and Vaughan-Whitehead 2007) and the EU's approach to international human rights in general (Alston 1999; Arts 2000; Fierro 2003).

Evolving EU ambitions: softer instruments, broader objectives

Since the 1990s, the EU's role in promoting the social dimension of globalization has evolved from a narrow focus on promoting CLS through trade to a broader and more ambitious international social agenda (see also Orbie and Babarinde 2008: 461–69). Before outlining the main questions and the conclusions of this book, this section provides a detailed overview of this evolution.

The demise of the social clause

Between 1993 and 2000, the European perspective was influenced by the international debate on a 'social clause' in the context of the newly established WTO. Sparked by increased international competition and growing unemployment, most European governments were in favour of a binding linkage between the observation of labour standards and trade rules. Developing countries fiercely resisted this idea fearing hidden protectionism: the pursuit of lofty ideals such as the abolition of child labour would be used to impede developing country market access to Europe, and thus undo their comparative advantage in low-wage production (Lee 1997). However, the EU and its member states always insisted on a preference for rewarding countries that respect core labour standards, rather than an approach sanctioning developing countries. In addition, it was emphasized that Europe did not seek harmonization of social policies and wages, but confined itself to promoting the most fundamental standards linked with respect for human rights: abolition of slavery, forced labour and child labour; freedom to organize; right to collective bargaining.

Despite this European consensus, there were substantial disagreements within the EU on the desirability of integrating labour standards in the trade regime (see Chapter 9). In 1993, France, Belgium and the European Parliament[14] were the most enthusiastic supporters, followed by the European Commission. Trade Commissioner Sir Leon Brittan formulated his position on the 'social question' as follows:

> this issue is a legitimate global concern, and cannot be taboo among participants in the world economy. The WTO must be actively involved on this issue, working with the International Labour Office and other organizations. The WTO must address problems such as child exploitation, forced labour or the denial to workers of free speech or free association. There must of course be fully adequate safeguards against unilateralism or protectionist abuse and developing countries must be able to benefit from their natural advantages, to exercise their right to economic development and to maintain domestic policies appropriate to their level of development.
>
> Sir Leon Brittan (1994)

At the same time, however, the Council Presidency was more wary. The Council emphasized 'general fears among public opinion' of international competition and encouraged a discussion on the 'complex interactions' between trade and labour standards, but it did not argue for a discussion in the framework of the WTO (Council Presidency 1994). This cautious stance results from opposition by some member states, notably Germany and the UK, which argued that the WTO 'is a trade organization, not a social organization'.[15] A 1995 Memorandum on the social dimension of international trade (Council Presidency 1995), proposed by the French Presidency, failed to reach a European consensus in favour of a social clause. Similarly, a European Commission (1996) communication on 'the trading system and

internationally recognized labour standards' was unsuccessful in forging a common position with a view to the WTO Singapore Conference (see Chapter 9). A compromise on 'trade and fundamental labour standards' was only reached by the Council at the end of 1999 shortly before the WTO summit in Seattle. From that point, the Union argued for the establishment of a permanent joint forum between the WTO and the ILO to discuss the social clause, opposing trade sanctions and favouring dialogue and incentives. However, the Seattle Conference collapsed, partly because of developing country opposition to US President Clinton's statement that trade sanctions should be possible against countries in violation of CLS.

Meanwhile, at the same time as efforts to reach a multilateral consensus on a social clause in the WTO context, the Union introduced labour standards conditionality into its Generalized System of Preferences (GSP) trade regime. Such a unilateral social clause was easier to establish because it did not involve negotiations with developing countries, and because GSP decisions are taken by qualified majority voting in the Council.[16] As explained in Chapter 9, the social GSP system was not very successful.

Until then, therefore, the scope of Europe's position on the international promotion of labour standards was limited to trade instruments. Other mechanisms for advancing the social dimension of globalization were rarely addressed. The possible contribution of the ILO to the social clause debate was emphasized, in particular by those member states who opposed a social clause in the WTO, but the Union did not actively pursue a more active role in the ILO, nor did it elaborate on the ILO's 'softer' tools.

Emergence of the social dimension of globalization

Limited progress on the trade front may have contributed to the Union's change of course from 2001, when Europe increasingly started to emphasize other mechanisms for promoting the social dimension of globalization. At the same time, the emphasis shifted from CLS to broader social and development-related objectives (see Table 1.2; Orbie and Babarinde 2008). This became clear during European preparations for the WTO Doha Conference, at which a new round of trade negotiations would be launched. While formally maintaining the Seattle mandate favouring a permanent ILO–WTO forum, several months before the WTO summit, it became clear that the EU was gradually abandoning this demand as a

Table 1.2 Evolving instruments and objectives in EU global social policies

	1995–2000 *social clause*	*Since 2001* *social dimension of globalization*
Instruments	Trade policies (hard approach)	Development co-operation International Labour Organization (soft approach)
Objectives	Core labour standards	Social dimension of globalization Decent work agenda Corporate social responsibility

concession towards developing countries (cf. Novitz 2002: 7–8; Van den Hoven 2004: 265–67). In its July 2001 communication on 'Promoting CLS and improving social governance in the context of globalisation', the Commission argued that the goal of promoting CLS remained the same, but that the ILO was a more suitable forum than the WTO. The title indicated the Commission's bending of its approach to external social issues, with the focus on CLS broadened to include general issues of social governance. Compared with previous documents, it has a greater emphasis on the importance of dialogue, stimulation and non-binding mechanisms such as development co-operation and corporate social responsibility. Surprisingly, given the timing of the document (European Commission 2001), there is no reference whatsoever to the Doha Conference. The *Financial Times* (18 July 2001) expressed it clearly: the European Commission feared that attempts to include labour standards in the WTO would jeopardize a new trade round.[17]

The year of the Doha Conference is a turning point in the EU's approach to the promotion of social objectives in the developing world. From 2001, Europe's discourse and initiatives have changed significantly, with an increased emphasis on soft and development-related instruments and a broader definition of 'social' objectives. The European globalization debate is no longer framed in terms of fair competition, but is more explicitly embedded in Europe's social and development discourse. There is also an institutional dimension to this 'forum shifting' from the WTO to the ILO: within the Commission, the main responsibility for Europe's policy on a 'social clause' – or, as it has gradually been renamed, 'the social dimension of globalization' – shifted from DG Trade to DG Employment and Social Affairs and DG Development.

The years following 2001 confirm the EU's choice to follow this track. The European Commission played an active role in the WCSDG, stressing the relevance of the 'European social model' and presenting the 'Lisbon process' and the 'open method of co-ordination' as examples of international social governance (see Chapter 5). Suggestions for linking labour standards with trade instruments disappear from the agenda.[18] The World Commission's report (WCSDG 2004) emphasized the importance of development aid, civil society, decent work, gender equality, sustainable development, democracy and accountability, the ILO and other United Nations (UN) institutions. However, the report does not contain a single reference to the international debate on a social clause, nor does it suggest how labour standards might be integrated in trade policies. Similarly, in its reaction to the WCSDG report, the Commission (2004: 14–17) suggested that successful trade negotiations will ultimately lead to economic growth and improved labour standards in the third world, a position confirmed by the Council (2005b).

Releasing global social goals from the trade framework brought new opportunities for the European Commission. It allowed the Commission to play an enhanced role in this area, in particular in relation to the ILO agenda. From 2001, co-operation between the ILO and the Commission intensified with an exchange of letters between the institutions, laying out the overall policy framework for EC–ILO co-operation. Since then, high-level meetings between the Commission and the ILO are held on an annual basis.

In 2004, the Commission signed a Strategic Partnership with the ILO explicitly targeted to developing countries (European Commission and ILO 2004; Delarue 2006).[19] On the European side, the document was signed by the Commissioners for Development (Poul Nielson) and Employment and Social Affairs (Stavros Dimas). Five focus areas for EC–ILO co-operation were identified: CLS with a special focus on child labour and education; corporate social responsibility and CLS (see Chapter 10); social dialogue; employment strategy and poverty reduction; and migration and development. For each area, gender equality is mainstreamed (see Chapter 11). The intensity, quality and scope of EU co-ordination in the ILO – executed by the Commission in tandem with the Council Presidency – has also increased (Delarue 2006; Nedergaard 2008: 14).

Upgrading the ILO's role

Since 2005, joint EC–ILO initiatives have increased. The EC co-funding of ILO initiatives or the ILO involvement in implementing EC co-operation, programmes and projects expanded substantially: from US$ 3.57 million in 2004 to US$ 19.07 million in 2005; and funding is expected to increase further in 2006 (European Commission and ILO 2006: 2–3). For example, in the context of the EC–ILO partnership, the Commission proposed an action programme valued at 15 million euros to facilitate access into primary education of children released from child labour, within the framework of the ILO's International Programme on the Elimination of Child Labour (European Commission 2005b: 120; 2006c). Seminars have been organized in order to enhance co-operation between local European Commission and ILO staff at field level, with a view to mainstreaming decent work in Europe's development programmes (European Commission and ILO 2006b: 5).[20]

Increased co-operation with the ILO is a primary European commitment in terms of its promotion of the social dimension of globalization. By aligning itself with the ILO's broader decent work discourse and programmes, the European Commission acquired a distinctive role in global social governance. The Commission's normative and development-oriented role in the ILO is less contested by EU member states than hard law activities related to labour standards conventions.

At the same time, the social dimension of globalization and decent work objectives have been integrated into the EU's main development policy documents. The 'social dimension of globalization, promotion of employment and decent work' forms one of the eleven areas of the Policy Coherence on Development communication (European Commission 2005a: 13–14). Equally, the European Consensus on Development – presented as an alternative to the Washington Consensus in development policies – includes a separate section on 'social cohesion and employment' (EU 2006: 15). In the past decade, the Union took several initiatives in relation to gender mainstreaming and civil society involvement in European external relations (see Chapters 11 and 12; Orbie and Babarinde 2008).

Additionally, the Commission has worked on a European corporate social responsibility (CSR) strategy since 2001, with an emphasis on non-binding and voluntary mechanisms (see Chapter 10). The intention to engage business

in developing a socially responsible corporate culture forms part of Europe's 'social model' and the revised Lisbon Strategy (see Chapter 10). Increasingly, the Union has tried to adopt a leading role in the development of an inclusive approach towards the private sector in the definition of social objectives and the co-ordination of CSR strategies, through initiatives such as the promotion of a European Alliance for CSR or a re-launching of the European Multi-stakeholders Forum on CSR.

In this context, the Union's initiatives in relation to the international promotion of the rights of the child can also be mentioned. In Chapter 13, Ian Manners analyses the fast rise of children's rights on the internal and external agenda of the EU. The EU's more proactive approach in the past ten years is evident from initiatives in four areas, namely extra-territorial legislation, the UN Charter of Fundamental Rights, the abolition of the death penalty, and poverty reduction and social exclusion. The Union has used a variety of approaches to address these issues, and it is currently developing more concrete actions for the international promotion of the rights of the child.

The Commission communications on decent work and employment (European Commission 2006a; 2007) constitute the most recent manifestation of Europe's choice for a broader and non-binding approach to promoting social objectives in the world. The European Council (2007) Declaration on Globalization reaffirmed the 'commitment with the decent work agenda as a global instrument to promote employment, better labour standards and foster development'. It seems indisputable that the European debate on a social clause through trade has effectively disappeared within a comprehensive set of alternative instruments and objectives.

The search for coherence

Two questions emerge from this observation. First, how can we explain this change in the EU's approach? As suggested above, it provided an escape from the social clause debate, which had not only reached an impasse on the international front due to developing country opposition, but had proved divisive even within the EU, with most member states considering this not to be a priority in trade negotiations. It could also be argued that a broader and non-binding approach will be more fruitful in the long term, in line with the EU's internal Lisbon process that attempts to reconcile economic and social objectives. In many ways, the ILO's current phrasing of its priorities, the decent work initiative, echoes the EU's Lisbon Strategy by mixing economic and social imperatives in an integrated approach.[21]

Equally, this opened new opportunities for a more active role to be played by the European Commission in international social and development issues. In doing so, the Commission took advantage of the ILO's self-reinvention through the 1998 Declaration, the decent work agenda and the WCSDG. From this perspective, the EU and ILO have been useful allies: whereas the Union's support increased the legitimacy of new ILO activities, the ILO's activities offer a new area within which the Commission may act internationally.

Finally, this evolution can be situated within a more general trend in Europe's global role. Since 2000, the Union has taken a more ambitious stance on international development issues and on multilateral co-operation. This is illustrated by the EU campaign to reach the Millennium Development Goals and to increase European development aid spending (Carbone 2007). As various chapters in this volume illustrate, the question of whether the EU should be seen as a 'normative power' in world politics (cf. Manners 2002) is central to research on Europe's external action.

The second question is whether the Union has successfully applied these 'soft' mechanisms in promoting the social dimension of globalization. Although the social dimension of EU trade relations will be examined throughout the book (see in particular Chapter 9; also Chapters 2 and 4),[22] the contributions that follow mostly assess the level of success of the EU's new, broad approach to promoting the social dimension of globalization. More specifically, these contributions address the coherence[23] of the EU's role in relation to the social dimension of globalization from two perspectives. The first set of conclusions concerns multilateral coherence, which ultimately involves institutional consideration of the EU–ILO relationship.[24] The second conclusion concerns horizontal coherence, questioning coherence between social policies and other policies. In particular, the question is raised whether market-enhancing policies take priority over social policies. This involves taking a substantive perspective to the issue. Together, these allow us to make a more general assessment of the Union's role in promoting the social dimension of globalization.

Multilateral coherence: EU–ILO relations

As is clear from the survey above, the intensity of co-operation between the EU and the ILO has increased since 2000. This is in line with the general observation that the Union has increased its ambitions in relation to multilateral institutions in the past decade (cf. Laatikainen and Smith 2006). Several high-level meetings and joint programmes between the European Commission and ILO officials have been organized, and policy-makers from both institutions have emphasized their mutual compatibility. The EU has strongly supported ILO activities in relation to its 1998 Declaration on Fundamental Principles and Rights at Work and consequent emphasis on CLS, the WCSDG and the decent work agenda. In turn, the ILO has often emphasized the important contributions of the EU to its activities and the fact that Europe's social model may serve as an example for social governance at the global level.

Clearly, the relevance of the ILO can be seen throughout the areas discussed in the following chapters. For example, the relevance of the ILO has increased in the labour standards conditionality of the Union's trade policies. As discussed in Chapter 9, the GSP-plus labour standards conditionality explicitly refers to the findings of the ILO bodies, Europe's bilateral trade agreements generally refer to the ILO CLS, and the Union has argued for a permanent forum between the ILO and the WTO. Europe's development policies have also started to integrate the ILO focus

on CLS and decent work, and there is an increasing contribution to ILO-funded projects in developing countries (Orbie and Babarinde 2008). In Chapter 11 on gender equality in European development policies, Petra Debusscher and Jacqui True explain that EU gender help desks are staffed by ILO officials, indicating the value of ILO expertise on gender to the EU, despite what is generally seen as the EU's advanced social policy in relation to gender matters (see Chapter 2). In relation to the international promotion of the rights of the child, the Union has ensured multilateral coherence through enhanced co-operation with the ILO as well as the UN (Chapter 13). The action plans under the European neighbourhood policy refer to ILO social standards as benchmarks (Chapter 4). In contrast, the Union has not involved the ILO in the accession process with central and eastern European countries in the 1990s, where the influence of other multilateral institutions such as the World Bank and the International Monetary Fund was arguably more important (Chapter 3; Deacon 1999: 35).

Other chapters in this book more profoundly evaluate the relationship between the EU and the ILO. Overall, it can be concluded that the coherence of social policy agendas has indeed substantially increased. However, some concerns about the *nature* of this multilateral coherence between the regional and global levels of social policy are raised.

Before elaborating on this, the European Community (EC)'s capacity to act internationally on social issues in general, and in the ILO in particular, should be qualified. Compared with its external trade and development policies, where exclusive and shared competences are relatively well defined, EU competences in social areas are more ambiguous. According to the doctrine of implied powers, developed by the European Court of Justice (ECJ) in the 1970s, the EC possesses external competences in areas where it disposes of corresponding internal legislative competences. However, internal competences do not always translate into exclusive external powers. Following a conflict between the Council and the Commission on the ratification of ILO Convention No. 170 on Chemicals at Work, ECJ Opinion 2/91 stated that the existence of Community legislation on certain labour standards did not necessarily imply an exclusive Community competence to negotiate related conventions within the ILO. The ECJ held that, when the Community limits itself to setting minimum labour standards – which is often the case with directives under EC law – external competence in this matter is shared by the Community and member states (see Chapters 2 and 5), implying many facets of social policy in which the EU does not have external competence, especially in respect of pay, the right of association, the right to strike and the right to lock-out (Novitz 2002).

Attempts by the European Commission, the European Parliament and the European Economic and Social Committee to give a larger co-ordinating role to the Community in the ratification, implementation and supervision of ILO labour standards date back to the 1970s (Orbie *et al.* 2005). To date, the Community's role in relation to these labour standards – including the CLS – remains sketchy (see e.g. Cavicchioli 2002; Novitz 2002). Although Opinion 2/91 reminded the Commission and member states of their obligation to co-operate in the international

representation of the Community in the ILO, EU members continue to resist sharing formal competence at the ILO with the Commission. Within the ILO, the European Commission is a non-voting observer, unable to vote on the adoption of conventions or recommendations; nor is it possible for the EU to ratify ILO conventions.

However, the EU manages to play a more significant role in the day-to-day politics of the ILO, through co-ordination by the Council Presidency and the European Commission (cf. Chapter 5; Nedergaard 2008). Interestingly, this mirrors the Union's position in the World Health Organization (WHO), as explained in Chapter 8. Here too, the EU's formal role is limited, *inter alia* through a case before the ECJ. The Commission only has observer status in the WHO, and European positions are often mediated through the Industrial Market Economy Countries (IMEC) group. However, Sebastien Guigner discovers that, despite formal limitations, European co-ordination within the WHO is often successful in practice. Paralleling the situation with the ILO, there has been a strengthening of formal co-operation with the WHO since 2000, with an exchange of letters and the organization of high-level meetings. Finally, Guigner sets out a tension between regional (European) and global (WHO) governance in health matters.

The interplay between regional and global governance is precisely the focus of Chapter 5, where Ailish Johnson analyses the interaction between EU and ILO forms of social governance from a historical perspective. Before 1970, ILO conventions played an important role in suggesting key areas for social co-operation in the newly formed Community, and in providing advice on health and safety standards and labour mobility. However, this balance slowly began to shift. Johnson notes an increasing tension between EU and ILO legislation since the 1970s, when the emphasis shifted from global to regional standard setting in social policy. More recently, the EU's regional social policy serves as a building block for the global governance of social issues, rather than a stumbling block. On the political and normative side, regional and global governance prove to be largely compatible and mutually beneficial. Johnson argues that the EU has become a kind of 'policy incubator' for the ILO, serving to pre-cook ideas at the regional level for potential export to the global level, such as in the European Employment Strategy. Coherence between the social objectives of the EU and the ILO is particularly strong in the promotion of soft law activities (in contrast to specific standards and conventions) and in the formulation of international policies (in contrast to intra-EU social affairs).

Moreover, the compatibility between the two institutions may also be increasing with regard to specific labour standards that touch upon intra-EU regulations. In Chapter 7, Lisa Tortell, Rudi Delarue and Jeffrey Kenner analyse the EU's proactive role in the negotiation, ratification and implementation of the ILO Maritime Labour Convention 2006 (MLC). The EU has been involved at many levels: it has provided financial assistance to the ILO by co-funding the International Labour Conference that adopted the Convention; it co-ordinated the viewpoints of its member states during the amendment and adoption process, allowing for a concerted 'European' stance to be taken; it has provided the political will to support

the implementation of the Convention, with the Commission encouraging ratification by its members; and it has taken this a step further in moving towards the introduction of European law incorporating the Convention, through consensus between the social partners. In explaining why the EU has been such an enthusiastic participant in the MLC project, the authors point to Europe's self-interest in constructing a global level playing field in the maritime sector, mirroring the EU's *acquis communautaire* in this area. However, they also emphasize that more normative goals played a role, such as the value placed by the European Commission on both the EU–ILO relationship and the social dimension of globalization. This evolution resulted in a more visible, coherent and outward looking EU than at previous ILO official meetings, when the EU role had been oriented mainly towards ensuring compatibility with EU legislation.

The observations from this recent case study run counter to the conclusions in Chapter 6. Robert Kissack focuses on the negotiation and ratification of the fifty ILO conventions adopted since 1973, the first year of formal EU co-ordination in the ILO. He comes to the paradoxical conclusion that the more active the EU is during the drafting of an ILO convention, the lower the number of ratifications it receives from ILO members. When the EU attempts to shape future norms through influencing the content of ILO standards, those standards remain largely unsupported by other states. Several explanations for these results are discussed, ranging from the deliberate pursuit of economic interests by the EU in the ILO context, through the prevalence of member state interests in European politics, to unintentional effects ensuing from the EU's institutional structure. According to Kissack, these conclusions qualify the *prima facie* claim about the harmony of interests underpinning the EU's social model and the objective of improved global working standards, and point to a 'fundamental clash of interests' between the regional (EU) and global (ILO) levels in the area of labour standards. It remains to be seen whether these conclusions will also hold true in the coming years, or whether the MLC heralded a new phase in EU co-operation within the ILO on labour standards.

In any case, the second chapter in the book comes to similarly critical conclusions about the new impetus in EU–ILO relations, but this time based on an analysis of the normative mandates of both institutions. Tonia Novitz argues that, 'while the EU and ILO may be working together, gainfully using each other to gain legitimacy and influence respectively', they also have diverging objectives. As the ILO is the most vulnerable partner in this relationship, the social dimension of ILO labour standards may be gradually eroded by the market-oriented influence of the EU.

In conclusion, there has always been a tension between the regional social standards of the EU and the ILO's activities at the global level. Nevertheless, the multilateral coherence of both institutions has grown in the past decade. This is particularly clear in the normative sphere, namely around the promotion of CLS and decent work, as well as the sanctioning of specific countries such as Burma/Myanmar and Belarus. The EU's role in the negotiation of the MLC even gives credit to the claim that EU–ILO co-operation has also increased in relation to

specific labour conventions that touch upon intra-European regulations – although it remains to be seen whether this recent example forms an exception to the general rule that intensive European co-ordination implies problematic ratification records among ILO members. The desirability of using European standards as a model for global standards contained in ILO conventions, therefore, is not as obvious as it might seem at first blush, assuming the ILO's primary intention of all conventions is to achieve as close to full ratification as is possible.

More fundamentally, the nature of the symbiotic relationship between the EU and the ILO has been questioned. According to Johnson (Chapter 5), the main challenge is not the tradeoffs between market-based economics and social policy, but ensuring workers' rights through an effective co-operation between the regional and the global level. In comparison, in Chapter 2, Novitz suggests that, in practice, growing EU–ILO coherence leads to a more market-oriented orientation of the ILO, which may be detrimental to the protection of workers' rights. Although the relationship between the EU and the ILO may seem harmonious and mutually beneficial, there is a power imbalance in favour of the European orientation.

This brings us to the second aspect of EU coherence in promoting the social dimension of globalization, namely the tension between social and other objectives, as discussed in the following section. The institutional and substantive elements of EU policy in this area are undoubtedly linked.

Horizontal coherence: social versus economic policies

The coherence between social and other objectives constitutes another cross-cutting issue through the book. All the contributions address the thorny question of whether the pursuit of a social globalization has been hindered by other European external policy objectives. In Chapter 13, Ian Manners shows that the Union has achieved greater horizontal coherence by bridging the gaps between children's rights in terms of commercial and sexual exploitation, in terms of economic development and in terms of involvement in armed conflict. However, the horizontal coherence issue is mostly framed in terms of social versus economic objectives and, more specifically, the tension between interventionist policies (e.g. the promotion of labour standards) and market-enhancing measures (e.g. building free trade areas) is highlighted in several contributions. When arguing for a social dimension to globalization, the EU makes it clear that it wants to counterbalance the forces of the market. Globalization is seen as an opportunity and should not be reversed – on the contrary; however, European policy-makers emphasize that globalization should be 'harnessed'. Besides stating that the EU should follow a middle course between old-fashioned protectionism and unbridled free trade, the harnessing globalization discourse suggests that normative foreign policy objectives such as sustainable development and human rights should be taken into account (Orbie 2008: 46ff). As the Laeken Declaration put it, Europe could be seen as a 'power seeking to set globalization within a moral framework' (European Council 2001).

Thus, the EU's initiatives in the area of the social dimension of globalization are part of a broader discourse on the (re)embedding of social objectives in its external economic relations. This is also reflected in the Union's ambition to reach the Millennium Development Goals, *inter alia* through increasing the amount and the quality of aid budgets (see an overview of various commitments in Chapter 12), and in the drawing up of a 'European Consensus on Development' (EU 2006), which would provide an alternative to the 'Washington Consensus' (see various chapters). At the same time, EU discourse draws a clear linkage between the Union's internal and external policies. It is argued that the balance between open and competitive markets, on the one hand, and sustainability and solidarity objectives, on the other, constitutes an integral part of the European model. In turn, Europe's experience with this model of integration and, more specifically, its Lisbon Strategy for Growth and Jobs could inspire its international policies.

While acknowledging that Europe has increasingly paid attention to the social dimension of economic globalization, and that the Union's policies cannot simply be seen as engines for doctrinal neo-liberalism, most contributions to this book point to the dominance of market objectives. In the first three chapters, it is suggested that the glass is half empty rather than half full; the balance between market and social objectives is often tilted in favour of the former. Interestingly, all three contributions, on different topics, point out that this reflects the internal market model of the EU.

For example, Novitz shows that, despite apparent divergences, it may be possible to understand EU social policy as coherent, both internally and externally, by reference to its essential market-led orientation. Her analysis is based on the European position in two fields of CLS: freedom of association and gender equality. First, Novitz elaborates on the limited role of EU law and the deficient compliance of EU member states with regard to the freedom of association conventions. While the right to strike and collective bargaining have been further complicated at the EU level by the restrictive verdicts of the ECJ in the *Laval* and *Viking* cases, the EU considers these conventions to be an uncontroversial basis for withdrawing trade preferences from pariah states such as Belarus. However, a closer examination reveals that such condemnation is still consistent with the EU's liberal view of freedom of association, which puts more emphasis on individual freedom of choice rather than the strength of collective voice. This general preference for the first generation of human rights (civil and political rights) over the second generation (social and economic rights) in European external relations, despite the rhetoric of the indivisibility of rights (see e.g. Deacon 1999: 25–28), is also mentioned in other chapters (Chapter 4 on the EU's monitoring of the European neighbourhood policy progress reports, Chapter 9 on social conditionality in Europe's bilateral trade agreements). However, in Chapter 13, Manners notes that the post-Cold War human rights agenda brings together political and social rights.

Second, Novitz contrasts the extensive EU legislation in the area of gender equality, and impressive European member states' compliance with the two ILO discrimination conventions, with the programmatic approach to this issue in

Europe's development policy. The principle of equal pay for work of equal value is expressly stated in the EC Treaty, and there has been considerable legislative activity as well as supplementary jurisprudence developed by the ECJ in the area of gender equality. In contrast, there is little evidence that gender equality has been an important consideration in EU external trade conditionality. As illustrated in Chapter 11, the Union's international role in promoting gender equality is mainly based on softer and developmental approaches. Novitz claims that this developmental approach is aimed at enabling third states to perceive their own economic benefits of gender equality. On further consideration, internal EU legislation on gender is also consistent with increased productivity and growth through the achievement of a knowledge-based economy. Gender equality is an imperative for the successful completion of the internal market.

Viewed in this way, the EU approach to both collective labour relations and gender equality may make more sense than seems apparent at first sight. Rather than exporting its 'social model', the EU is exporting a 'market model' that reflects the particular role that labour standards and gender norms can play foundationally within a European labour market structure. The two following chapters confirm this conclusion, examining European enlargement and neighbourhood policies.

In Chapter 3, Maarten Keune delves into the area in which internal and external EU relations are most closely interlinked: European enlargement policies. After briefly considering the concept of the 'European social model', he considers the extent to which and manner in which the EU has used the enlargement process as a vehicle for disseminating its social standards and values. In this context, he examines the social criteria with which candidate countries were confronted in the run-up to membership and their implementation in the new member states. Keune focuses on both the EU's hard social *acquis* (working time directive, regulations on equal treatment, directive on information and consultation) and its soft social *acquis* (open method of co-ordination on employment and social inclusion; social dialogue). His analysis shows that the actual dissemination of EU social *acquis* depends on the specific subject and country context. Turning to the implications of the EU economic *acquis* on labour market and welfare state regulations and policies of new member states through considering the impact of internal market regulations and European monetary union, Keune argues that the requirements stemming from EU membership may even exert downward pressure on social standards in new member states. In line with the previous chapter, Keune reaches the conclusion that enlargement has been directed more by economic concerns than by concerns of social integration and convergence. He characterizes the EU as a weak transnational actor in the social field, which has prioritized economic integration by liberalization, deregulation and competition.

This analysis is taken one step further in the third chapter, by looking at the export of the European social model through the European Economic Area (EEA) and the European neighbourhood policy (ENP). In examining the EEA, Sieglinde Gstöhl looks at the diffusion of EU social *acquis* and the role of the ECJ. The analysis of the ENP involves examining the bilateral agreements and action plans, and considering the relevance of social issues in trade and aid aspects of the

Union's neighbourhood policy. The differences in the objectives and instruments of these two neighbourhood policies are reflected in the diffusion of Europe's social norms. Whereas the EEA extended most of the social *acquis* to the European Free Trade Area countries as part of the economic *acquis*, the social dimension of EU relations with the other neighbours has been narrower, given the focus on stability and security at the Union's borders. Only 'bits and pieces' of Europe's social model are being exported to its eastern and southern neighbours. Nevertheless, the ENP encourages social reform, *inter alia* by using ILO conventions as a benchmark. The EU's leverage is, however, limited without the 'carrot' of membership, despite the establishment of various soft mechanisms. In line with Keune's conclusions in the previous chapter, Gstöhl points to the importance of ruling elites in the EU's partner countries. She concludes that social issues are not a priority for either side, compared with other ENP objectives such as internal market rules and security considerations. Even in the tight legal setting of the EEA, the EU's social impact was limited given the already high standards in the EFTA countries.

Other chapters also show that the secondary importance of social objectives to the EU is sometimes accentuated by third country resistance. Developing countries successfully resisted a social clause in trade politics, although the EU's commitment to this was also ambiguous (Chapter 9). The same is true for EU development co-operation, where the promotion of gender equality (Chapter 11) and the involvement of local civil society organizations (Chapter 12) have not always been enthusiastically welcomed by southern governments. However, as regards the participation of southern civil society movements in the Union's relations with developing countries, An Huybrechts and Rafael Peels conclude that the EU has favoured their involvement in 'softer' areas such as development, good governance and migration, but that it has more difficulties in engaging southern civil society in 'harder' policies such as transport, infrastructure and trade, which involve more interests for both the EU and local governments (Chapter 12).

In relation to the success of Brussels-based gender and development advocacy networks in bringing a gender perspective to EU development policy, Petra Debusscher and Jacqui True (Chapter 11) conclude that much has been achieved with respect to the integration of gender equality into the objectives of European development policies, and that a European gender and development advocacy network has played an important role in this respect. However, they also suggest that this strong political commitment has not gone hand in hand with a strong implementation of this norm. A combination of geopolitical, institutional and financial factors contributes to the limited implementation of gender mainstreaming in EU external policies. They utilize the term 'gendersclerosis' (Lister and Carbone 2006) to explain the gap between rhetoric and practice in EU gender policy. They identify, in particular, the increased focus on security politics and UN reforms in the aftermath of the terrorist events of 9/11 as taking priority over gender considerations in external EU policy. Once again, therefore, other factors intervene to prevent social goals having primary importance.

The prioritization of market enhancing measures, compared with more interventionist social objectives, is also highlighted in EU trade policies. After concluding that the EU's success in integrating labour standards in external trade relations has been limited, Jan Orbie, Myriam Gistelinck and Bart Kerremans provide a number of explanations. One general line of explanation emphasizes that, as a 'regulatory state', the EU's mandate has been focused primarily on the functioning and deepening of the internal market. This is also mirrored in the EU's 'new' trade policy agenda, which mainly aims to project its internal market to the global level – including regulatory convergence as well as liberalization. Moreover, this chapter shows that interventionist trade rules such as labour standards have not been a priority, compared with market enhancing rules in trade-related areas such as competition, investment, government procurement and intellectual property rights.

Thus, as in other chapters, the point is not so much that social aims are considered unimportant, but rather that they have often been overshadowed by market-making objectives that continue to constitute the core of the EU's mandate. More specifically, market integration is generally pursued through 'hard' means, underpinned by the Union's extensive legal machinery, whereas the promotion of labour standards has followed a 'softer' track through dialogue and co-operation. These findings correspond with what Scharpf (2002) calls the 'constitutional asymmetry' of European integration, because of divergent dynamics between policies promoting market efficiencies (strong legal instruments at EU level) and policies promoting social protection and equality (mostly at national level and hindered by the supremacy of EU rules). It seems that this asymmetry also casts a shadow on the EU's external policies.

This 'hard versus soft' debate is central in the contribution on corporate social responsibility (CSR). In Chapter 10, Olga Martin-Ortega and Muzaffer Eroglu examine the EU's policy in influencing the business world through the international promotion of CSR. This chapter analyses the origins and development of the EU's approach within the context of the international discourse on corporate responsibility in relation to human rights and the environment. In particular, the authors focus on the tension between a voluntary-based approach to business responsibilities and attempts to define an international legal framework. However, they argue that the debate should go beyond binding norms and voluntary options as closed categories, and that the potential for interaction between both methods should be considered. A 'third way' for CSR regulation should be based on a combination of legal obligations and voluntary contributions from business. In this respect, the Union has been only partly successful. On the one hand, voluntary and soft law approaches have been dominant and more determinant within the political agenda. On the other hand, the EU's adherence to regimes such as the Kimberley Process (on international trade in rough diamonds) and its design of systems promoting human rights within development policy (e.g. human rights considerations in public procurement for EU development aid projects; CSR dialogue under the EU–Africa Business Forum) trigger the potential for developing an effective framework where hard law, soft law and voluntary measures

interact. Although the human rights norms that apply within the EU framework do not apply extra-territorially, the EU has the instruments to challenge this extra-territoriality in relation to legal persons by developing adequate norms to make accountable companies that are domiciled in a member state and participate in human rights abuses abroad. However, to date, these possibilities have scarcely been explored by the EU.

In Chapter 13, Ian Manners analyses the EU's advocacy of extra-territorial legislation to combat the commercial sexual exploitation of children. More generally, he argues that the debate on Europe's hard versus soft external policy instruments should be exceeded, but in a different way. The more important question is whether the Union's principles, actions and impact in relation to the social dimension of globalization can be considered as part of its 'normative power' in world politics. Given that the social dimension of globalization is a cross-cutting and horizontal foreign policy issue, this is difficult to achieve and to analyse.

Concluding remarks: towards a global social power?

Thus, as was evident in relation to both multilateral and horizontal coherence, we conclude on the basis of the contributions to this book that the EU's actions in this regard are, to quite some extent, increasingly coherent. However, this conclusion is also qualified, given that this is not necessarily coherence in favour of social objectives. In relation to horizontal coherence, it seems that other preoccupations, in particular market enhancing approaches, are clearly influential in the EU's external social policies.

An equally qualified response applies to the conclusion of the existence of a high level of multilateral coherence in this area between the EU and the ILO. While the EU and ILO rhetorical priorities and practical policies in this regard are clearly highly coherent, several contributions to this book suggest that this is not necessarily positive for the attainment of global labour and social rights: on the one hand, ILO policies could be 'infected' by the less socially coherent aspects of EU politics through the increasingly close co-operation between the two institutions and, on the other hand, as the EU acts primarily in its own self-interest in its dealings with other international organizations, the social dimension of globalization will be advanced as a matter of social policy by the Union only to the extent that it is consistent with the EU's own interests and norms. For example, in Chapter 7 on the ILO Maritime Labour Convention, it is argued that, by advancing its own self-interest, the EU has advanced the common interest as a side effect.

These conclusions, of course, suggest a negative answer to the pointed question of whether or not the EU's new, broad approach to the promotion of what is now called the social dimension of globalization has been successful in achieving the aims it has set itself. The contributions to this book suggest that the balance is tipped too far in favour of ensuring market enhancing imperatives to allow purely social goals to be given a primary role. More specifically, it appears that the Union's external policies have to a large extent been shaped by attempts to export the European *acquis communautaire*. Overall, this reflects criticism of

the Union's internal Lisbon Strategy, in comparison to those who claim that the Lisbon process guarantees a sustainable balance between economic and social objectives.

Nevertheless, Europe's new approach clearly has more potential than the previous social clause approach, which was doomed by matters at least partly outside the control of the EU. The broadening of the EU's international social agenda since the early years of this millennium runs parallel with an increased academic interest in the ideational dimension of Europe's global role. The notion of a 'normative power Europe' (Manners 2002, 2006)[25] has strongly influenced recent research on the international action of the EU, and it is also explicitly raised in several chapters in this book (see Chapters 3, 6, 8, 9, and 11). In line with the critical analyses outlined above, these evaluations are rather critical about the EU's normative disposition.

But as Manners himself concludes in Chapter 13 on children's rights, the Union has clearly asserted normative objectives and embarked upon normative actions, but it remains to be seen whether these will have any normative impact outside Europe. The EU's ambition to advance the social dimension of globalization is a relatively new external policy objective and, as a cross-cutting objective, it cannot easily be implemented. Therefore, it may be too early to give a verdict on the success of the Union's broader international social agenda.

Moreover, despite the general tendencies in terms of increased horizontal and multilateral coherence, it should be noted that, within the EU, there are substantial differences across issue areas and actors. The Union has indeed taken a more systematic and a more assertive approach to advancing the social dimension of globalization since the beginning of this millennium, but Deacon's (1999: 19) observation that the EU's performance is variable still holds true. To a large extent, the Union's initiatives in the area of the social dimension of globalization still constitute a patchwork of ideas and initiatives. For example, the contributions to this volume show that the Union has been relatively successful in a number of specific cases, such as the GSP-plus trade system, the involvement of civil society in development policies, the ILO Maritime Labour Convention and specific legislation in the area of CSR. Nevertheless, in relation to other initiatives, such as the inclusion of labour standards in bilateral trade agreements, the social dimension of the Union's enlargement and neighbourhood policies, the implementation of gender mainstreaming in development aid and the achievement of the Millennium Development Goals, the EU's actions are still at the preliminary stage. The EU plays a more proactive role in the ILO, but the relevance of this institution in the Union's enlargement and neighbourhood policies is relatively limited.

The flexibility of the EU's policies and actions has obvious positive elements, allowing, for example, for hard and soft approaches to be combined. The social dimension of globalization discourse takes advantage of the way in which the European social model and the Lisbon Agenda are consistent with the ILO's influential CLS and decent work initiatives, thus aligning the goals of these two powerful institutions. Whether or not this is successful in terms of the achievement of those goals internationally is another matter – and one that perhaps requires

further time and research before a conclusive answer can be reached. We are confident that the various contributions to this book constitute an important first step in this regard.

Notes

1 The terms 'European Union' (EU), 'Union' or 'Europe' are used interchangeably. The term 'European Community' (EC) is only used when emphasizing the historical dimension (pre-Maastricht era) or the legal basis (first pillar).
2 See e.g. European Commission (2001; 2004a; 2004b; 2006a;) and Council (2003; 2005a; 2006).
3 For an analysis of the impact of globalization on the EU, see e.g. Anderton *et al.* (2006) and Begg *et al.* (2008).
4 However, it should be noted that there is an international relations unit at DG Social Affairs, Equal Opportunities and Employment.
5 For an analysis of globalization, see generally Scholte (2005); Deacon (2007); Grugel and Piper (2007); Held and McGrew (2007).
6 For a summary of the ILO activities in this regard prior to the establishment of the WCSDG, see ILO (2002, 2004a, 2004b). For the ILO response to the WCSDG, see ILO (2004a).
7 See ILO (1999).
8 *Copenhagen Declaration on Social Development 1995*, Introduction, para. 10.
9 See Chapter 3: Expansion of productive employment and reduction of unemployment in *Programme of Action of the World Summit for Social Development 1995*.
10 See Chapter 9 in this volume about the debate on a social clause, and Helfer (2006: 161–62) about the evolution of the ILO. By placing an emphasis on the ILO's leading role in relation to the core rights dimension of globalization, the 1996 WTO Ministerial meeting 'acted as a catalyst' for the development of the 1998 ILO Declaration.
11 The term sustainable livelihoods is 'a surrogate term for sustainable employment and work in the formal and informal economies with reference to a person's capacity to maintain and enhance their capability and assets both now and in the future, while not undermining the natural resource base' (ILO 2005: para. 2).
12 For example, the High Level Segment of the UN Economic and Social Council in 2006 was devoted to the theme of full and productive employment and decent work for all and its impact on sustainable development. This resulted in a Ministerial Declaration emphasizing the importance of decent work.
13 Transcripts from open forum http://www.eu-sdg.ugent.be.
14 The 'Sainjon Report' of the European Parliament (1994) explicitly advocated incorporating a social clause in the final phase of the Uruguay Round which established the WTO.
15 Quote from UK Minister of Trade Ian Lang, House of Commons Hansard Debates, 6 December 1996.
16 The UK abstained from voting for the first GSP regulation with social conditionality in 1994: see Council (1994).
17 The Trade Commissioner at that time also hinted at the changing European stance (Lamy 2001).
18 See e.g. European Commission (2003) and Diamantopoulou (2003).
19 Note that Deacon (1999: 22) had suggested that the appointment of new Directors General of both the ILO and the WHO would lead to better relations between the EU and these institutions.
20 The increased co-operation between the EU and the ILO can be seen clearly in relation to the Maritime Labour Convention, in relation to which the Union hosted seminars as well as co-funded the International Labour Conference at which the Convention was adopted (see Chapter 7).

21 The European Social Agenda of February 2005 (European Commission 2005c) includes, among other things, the goal of decent work for all. The EU's Lisbon Strategy of hand-in-hand promotion of economic competitiveness, employment and social cohesion is in line with many of the recommendations of the WCSDG and with the decent work agenda. The new third cycle of the EU Lisbon Strategy, as endorsed by the European Council of December 2007, also highlights its external dimension.
22 In 2005, a new system of GSP conditionality was established, and the Commission intends to integrate a more ambitious social clause in the new generation of bilateral agreements with Asian countries (see Chapter 9).
23 See Nuttall (2005) for an overview of the discussion on coherence in EU international relations.
24 The term 'multilateral coherence' should be attributed to Helen Versluys (see 'European humanitarian aid policy from a political science perspective: an analysis of delegation and coherence', PhD thesis, Ghent University, 2008).
25 This role encompasses three characteristics, each of them suggesting that the EU is normatively different and that material interests alone cannot adequately account for Europe's external action: (1) the EU itself is a normatively constructed polity; (2) this predisposes it to act in a normative way in world politics; and (3) a normative power Europe diffuses these norms internationally without resorting primarily to coercion and military means, but by the ability to shape conceptions of 'normal' in international relations. Manners makes a distinction between Europe's 'core norms', such as liberty, democracy, respects for human rights and fundamental freedoms, and rule of law, and 'minor norms', such as social solidarity, non-discrimination, sustainable development and good governance (Manners 2002: 242–43).

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2 In search of a coherent social policy

EU import and export of ILO labour standards?

Tonia Novitz

> There is an inextricable link between the EU's internal and external policies. From the very beginning the Treaty recognized that there could be no internal market without the common customs regime and a common trade policy … Similar reasoning applies in a range of other policies – for example, … employment and social policy … – where the development of internal policies has naturally led to a more active external role for the EU.
>
> European Commission (2006a: 4)

If there were 'an inextricable link' between the internal and external actions of the European Union (EU) relating to social policy, as the European Commission has asserted, this might not only give credence to the claim that the EU is seeking to 'export' a particular European 'social model' internationally but, more significantly, the coherence of its aims could lend a degree of legitimacy to EU actions abroad (Meunier and Nicolaïdes 2006: 912–19). At the very least, EU external relations could not be viewed as hypocritical. In another contemporaneous policy document, the Commission made the further claim that, not only is the EU internal social project aligned to the International Labour Organization (ILO) agenda of 'decent work', but that increasing efforts will be made to ensure that its external policies are also (European Commission 2006b: 4, 6–8).[1] This chapter considers these two interesting and potentially inter-related assertions.

At the end of the Cold War, the EU's distinctive emphasis on free movement of goods, services, establishment and persons attracted considerable support and a new potential membership. By way of contrast, in the midst of what appeared to be deregulatory fervour, the ILO seemed to be in crisis. The ILO response was to focus on certain 'core labour standards' (or CLS), a decision that was regarded by some as a sign of its political weakness (Alston 2004), but by others as possessing significant tactical advantages (Langille 2005; Maupain 2005).

CLS are listed in the 1998 ILO Declaration on Fundamental Principles and Rights of Work as being: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. The principles

are derived from eight 'fundamental' ILO Conventions (see Chapter 1). These are ILO Convention Nos 87 and 98 on Freedom of Association and Collective Bargaining (1948 and 1949); Convention Nos 29 and 105 on the Elimination of All Forms of Forced and Compulsory Labour (1930 and 1957); Convention No. 138 on the Minimum Age for Admission to Employment (1973) and Convention No. 182 on the Worst Forms of Child Labour (1999); and Convention Nos 100 and 111 on the Elimination of Discrimination in Respect of Employment and Occupation (1957 and 1958). However, the obligation of states to promote compliance with the principles contained therein is understood to derive from their constitutional obligations as members of the ILO, rather than merely these eight instruments.

Support for CLS was bolstered by the presentation of a decent work agenda by the ILO Director General, Juan Somavia, to the ILO International Labour Conference in 1999. Being a multi-faceted strategy, decent work objectives encompass employment promotion (including enterprise creation), social protection and social dialogue, but are based on the foundation of legal protection of fundamental rights. As Somavia has put it: 'The ILO's standards system is at the heart of its Decent Work Agenda'.[2]

Decent work objectives have been approved widely, even by the UN General Assembly[3] but, as was observed in the report of the ILO World Commission on the Social Dimension of Globalization, policy coherence is lacking, such that the actions of other international agencies and regional organizations have the capacity to undermine the work of the ILO (WCSDG 2004). Indeed, the determination of the German presidency to place the social dimension of globalization on the EU agenda may be regarded as indicative of a desire to remedy this lack of coherence (Jenkins *et al.* 2007: 13).

If the EU is acting in compliance with a 'decent work' agenda, one might expect to find that the EU was engaged in both the import and the export of CLS. To test this hypothesis, this chapter considers the compatibility between EU internal and external policies relating to two aspects of labour law: freedom of association and gender equality. These case studies have been selected on the basis that both norms have received recognition as fundamental human rights internally within the EU and have status as CLS identified by the ILO. In this sense, EU and ILO agendas could be viewed as mutually reinforcing. However, what emerges is a more complex series of findings.

First, it seems that labour standards ripe for export may be problematic in terms of internal enforcement within a regional trading bloc. Compliance with ILO Convention Nos 87 and 98 may be an uncontroversial basis for withdrawing trade preferences when faced with a pariah state abusing the individual and collective freedoms of working people, but has proved more problematic to achieve internally in terms of detailed Community legislation. Indeed, there are indications that compliance of EU member states with ILO Conventions concerning freedom of association and collective bargaining can be undermined by requirements to comply with free movement provisions under the European Community (EC) Treaty. In contrast, gender equality, which is promoted extensively under EC law, would seem to be more difficult to insist upon in relations with third

states, given cultural sensitivities aligned with gender roles. It is unlikely to be the subject of withdrawal of trade preferences, but may be the focus of programmatic approaches aimed at enabling third states to perceive the economic benefits of compliance with ILO Convention Nos 100 and 111.

The suggestion presented in this chapter is that, despite these apparent divergences, it may be possible to understand EU social policy as coherent both internally and externally by reference to its underlying market-led orientation. The EU is not so much exporting its 'social model', but rather a 'market model', which reflects the particular role that labour standards can play foundationally within a European labour market structure. This involves a largely individualistic and instrumental interpretation being given to freedom of association within and outside the EU. Moreover, the programmatic manner in which gender inequality is being addressed through EU external relations is not inconsistent with the treatment of this issue internally under the Lisbon Strategy. Viewed in this way, EU treatment of both collective labour relations and gender equality may make more sense than might seem apparent on first inspection. This chapter ends by speculating on the potential for coherence, not only between internal and EU social policy, but between EU and ILO objectives, and expresses some tentative concerns as to what the outcome of such policy coherence might be.

Importing and exporting ILO standards relating to freedom of association

The very first ILO Constitution, set out in Part XIII of the 1919 Treaty of Versailles, recognized that freedom of association would play a vital role in the pursuit of social justice (Murray 2001: 35–47). This is unsurprising, given that, without the full freedom of workers and employers to join associations and to act in association, the tripartite process through which the ILO operates would be unworkable (Fashoyin 2005: 40; Novitz and Syrpis 2006: 382). The importance of freedom of association was also emphasized in Articles I(b) and III(e) of the 1944 Declaration of Philadelphia, subsequently incorporated into the ILO Constitution. In addition to the supervisory powers of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), responsible for assessing compliance with ILO Convention Nos 87 and 98, supervisory machinery relating specifically to freedom of association operates within the ILO, such that complaints may be investigated by the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) and cases scrutinized by the Governing Body Committee on Freedom of Association (CFA) (Novitz 2003: 114–20, 188–91).

At present, EU competence to take measures to implement labour standards is set out in Chapter 1 of Title XI of the EC Treaty, namely Articles 136–145 EC. These provisions are, themselves, the result of slow and incremental development of EC social policy (Kenner 2003; Syrpis 2007). Notably, by virtue of Article 137(5) EC, the matters deemed appropriate for EC legislation do not include 'pay, the right of association, the right to strike, or the right to impose lock-outs', a state of affairs which would not even have been altered by the Lisbon Reform Treaty.

The limited protection lent to freedom of association under EU law is often attributed to the difficulty in transplanting or unifying collective labour law systems. These are considered to be deeply entrenched in the constitutional traditions of member states and not readily susceptible to change without considerable inroads being made on national sovereignty (Kahn-Freund 1974, but a view criticized by Ryan 1997). The result is that there is no EC Directive that requires member states to respect rights to form and join trade unions, to engage in collective bargaining and to take industrial action. Nor is there any immediate prospect of such legislation. This may seem surprising, given the prominence of 'social dialogue' within the EU and, thereby, the EU's institutional reliance on national-level protection of freedom of association.[4]

There are ways in which freedom of association can still be protected under EU law, even if there is no legislative competence to adopt an EC Directive on the subject. One is through the exercise by the European Court of Justice (ECJ) of its general principles jurisprudence. The judiciary have interpreted and applied the EC Treaty and subsidiary legislation in a manner that seeks to be sensitive to the constitutional traditions of the member states and their human rights obligations under international instruments including, most notably, the European Convention on Human Rights 1950 (ECHR). Indeed, the ECJ has been willing to acknowledge that some social rights guaranteed under international human rights instruments may be regarded as fundamental and, thereby, a constraint on the adoption and implementation of Community law. An example is Case 149/77, *Defrenne v Sabena (No 3)* [1978] ECR 1365, at paras 26–27, in which the ECJ made reference to the elimination of discrimination on grounds of sex contained in both the European Social Charter 1961 and ILO Convention No. 111. It is arguably through this legal mechanism that the shared legacy of labour legislation and constitutional law of member states has made respect for certain social standards a precondition for and foundation of the EU 'market model' (European Commission 1994: especially para. 3).

In Case C-415/93 *Union Royale Belge des Societes de Football Association and Others v Bosman and Others* [1995] ECR I-4921, the ECJ determined that freedom of association could be used as an interpretative tool in the context of determining the scope of free movement of workers under EC law (para. 79). In Case C-67/96 *Albany International BV v Stichting Bedrijsfonds Textielindustrie* [1999] ECR I-5751, the ECJ omitted mention of fundamental rights altogether, but nevertheless found that some forms of collective agreement may be exempt from EC competition law provisions. However, the ECJ has not been over-eager to lend protection to collective bargaining, as is demonstrated by Case C-499/04 *Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] IRLR 400. The issue raised in this litigation was the extent to which a new employer should be considered to be bound by a collective agreement after a transfer of an undertaking. The ECJ determined that terms set out in a collective agreement at the time of transfer could be incorporated into each individual worker's contract of employment, the employer could not be considered to be bound by provisions contained in a subsequent collective agreement without the employer's consent, nor was the employer obliged

to try to maintain relations with the relevant trade union. The justification given (at para. 33) was the principle of negative 'freedom of association', namely the right of an employer not to have to associate or enter into an agreement with a union. This is an approach that prioritizes individual freedom of contract as opposed to collective bargaining within the EC labour market. It also circumscribes the obligation of states to promote collective bargaining under Article 4 of ILO Convention No. 98.

Another means for protection of workers' collective rights in the EU may be the two Charters of 1989 and 2000. Freedom of association does receive recognition in the Community Charter of the Fundamental Rights of Workers 1989 (CCFSRW) and the EU Charter of Fundamental Rights 2000 (EUCFR). However, the limited legal effect of these instruments must be acknowledged. The CCFSRW was initially adopted as a declaratory instrument by only eleven of what were then twelve member states. Reference is made to the CCFSRW under Article 136 of the EC Treaty and, *albeit* sparingly, in the ECJ's fundamental rights jurisprudence (Betten 2001: 157). The position as regards the EUCFR is more complicated. This instrument was adopted as a 'solemn proclamation' by the Parliament, Council and Commission, but Article 51(2) of the EUCFR stated that: 'This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. After some delay, the ECJ has shown in Case C-303/05 *European Parliament v Council of the European Union*, [2006], E.C.R. I-5769, that it is willing to make mention of the EUCFR as a source of general principles (see para. 38). The EUCFR would have been recognized in Article 6 of the EU Treaty had the Lisbon Treaty been implemented. However, that recognition would in any case have remained subject to a protocol that limited its application in Poland and the UK, because of the feared effects of the rights to collective bargaining and industrial action set out in chapter IV.[5]

The concerns that led to the adoption of the Protocol seem, however, to be largely unfounded, given the actual wording of EUCFR provisions relating to freedom of association. Indeed, in both the CCFSRW and the EUCFR, there appears to be a notable distinction drawn between the individual freedom to associate and other aspects of trade union association, such as collective bargaining and the right to strike. The right of the worker to join or refuse to join an association is treated as an unqualified entitlement in both Charters (CCFSRW 1989, Article 11; EUCFR 2000, Article 12). However, rights to negotiate, conclude collective agreements and engage in collective action are made explicitly subject to national laws and practice (see CCFRSW 1989, Articles 12–14; EUCFR 2000, Article 28). This distinction does not altogether accord with the jurisprudence developed by ILO supervisory bodies, according to which rights to engage in collective bargaining and take industrial action in defence of workers' interests are understood to be an essential aspect of freedom of association (ILO 2006: paras 495 and 521). Arguably, the EUCFR goes even further in restricting the collective activities of workers, in that Article 28 also states that exercise of the entitlements set out therein must be 'in accordance with Community law'. Article 28 thereby suggests that the rights under national law to bargain or strike may be struck down to the extent that they are inconsistent with the market freedoms guaranteed under EC law.

Clauses have been incorporated into EC Directives that seem to provide some scope for protection of the rights to engage in collective bargaining and take industrial action where such rights conflict with provision for the free movement of goods and provision for the free movement of services and establishment. However, the wording of the actual clauses has differed. By virtue of Article 2, Council Regulation (EC) No. 2679/98 on the functioning of the internal market in relation to the free movement of goods among the member states (the 'Monti' Regulation) 'may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike'.[6] In contrast, Article I(7) of Directive 2006/123/EC on Services in the Internal Market (the Services Directive) 'does not affect the exercise of fundamental rights as recognised in the Member States *and by Community law*' (my emphasis).[7] Nor does it 'affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices *which respect Community law*' (my emphasis again). The latter provision would seem to indicate that, while rights of freedom of association, collective bargaining or industrial action are not to be affected by the terms of the Services Directive, *other* facets of Community law – namely relevant Treaty provisions – may limit their application (Novitz 2007). Such a provision implicitly leaves determination of the scope of these rights to the ECJ. The relevance of the technicalities of this wording becomes readily apparent when reading two recent judgements of the ECJ, Case C-438/05 *ITF and the Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti* (11 December 2007, [2008] 1 CMLR 51) and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Avdelning 1 of the Svenska Byggnadsarbetareförbundet, Svenska Elekrikerförbundet* (18 December 2007, [2008] 2 CMLR 9).

The *Viking* and *Laval* judgements are significant in that they recognized for the first time that 'the right to take collective action must … be recognised as a fundamental right which forms an integral part of the general principles of Community law' (*Viking*, para. 44; *Laval*, para. 91). However, the judgements also make it clear that EU member states can be regarded as being in breach of EC Treaty provisions relating to free movement of establishment (Article 43) and/or free movement of services (Article 49) where their legislative regime permits industrial action that affects the exercise of these freedoms and cannot otherwise be justified as proportionate with reference to the 'protection of workers'. This then is the way that the reference to Community law in the Services Directive becomes relevant. The ECJ goes further in these judgements, in that it finds that these Treaty provisions have horizontal direct effect and so bind, not only member states, but the trade unions organizing industrial action. This means that, when exercising the right to strike, trade unions can be held directly accountable for any breach of Community law, subject to the defence of justification. These findings are likely to lead to more litigation against trade unions, which will have to demonstrate in each instance that their action is legitimately for the 'protection of workers' and is proportionate.

The difficulties that the prospect of such litigation potentially poses for trade unions are compounded by the Court's very narrow construction of what might

come within the scope of 'protection of workers'. In *Laval*, the Court did not accept that action seeking to require the employer of posted workers to enter into negotiations amounted to the legitimate and proportionate protection of workers' interests (para. 100). This was apparently because the rate of minimum pay that would arise from such negotiations was unspecified. In *Viking*, it was only the preservation of jobs and terms and conditions that could fall within the scope of this justification. Indeed, the ECJ was critical of solidarity action taken under the auspices of the International Transport Workers' Federation (ITF), which would oppose reflagging of vessels away from the country where beneficial ownership is held because, in theory, this could lead to action against relocation to a jurisdiction where the terms and conditions for workers were superior (para. 89). The Court did not appreciate that flags of convenience are a means by which ship owners have progressively eroded seafarers' terms and conditions of employment, for where the flag state is not one where there is beneficial ownership, enforcement of the legal rights of seafarers becomes highly problematic (Fitzpatrick and Anderson 2005; see also Chapter 7).

One can compare the *Viking* and *Laval* judgements with the established jurisprudence of the ILO Committee on Freedom of Association, which states that:

> the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers
>
> *Digest of Decisions* (2006: para. 526); see ILO (2006)

and that

> organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living.
>
> *Digest of Decisions* (2006: para. 527); see ILO (2006)

The outcome of the *Viking* and *Laval* litigation indicates that not only are aspects of freedom of association such as collective bargaining and the right to strike not protected under Community legislation, but national legislation providing such protection can be curtailed by the ECJ. It also indicates the potential for the Court to adopt a much more restrictive view of the legitimate objectives of strike action than ILO supervisory findings.

The assumption made in Commission documentation seems to be that EU member states themselves respect and are in full compliance with ILO standards, but while all twenty-seven current EU member states have ratified Convention Nos 87 and 98 on freedom of association and collective bargaining, they have not

been found to be in universal compliance by ILO supervisory bodies. For example, at the time of writing, in Spain, laws relating to freedom of association do not cover foreign nationals; in Belgium, access of worker and employer representatives to the National Labour Council is left to the discretion of the government; and in Denmark, the government has yet to respond to the repeated request that it indicate 'measures taken to ensure that Danish trade unions may represent all their members – residents and non-residents employed on ships sailing under the Danish flag – without any interference from the public authorities'. Additionally, the adequacy of protection of the right to strike in Bulgaria, Cyprus, Germany, Poland and the UK has been called into question.[8] Admittedly, the ILO International Labour Conference has not adopted a 'special paragraph' in respect of any of these EU member states, this being the ILO's ultimate expression of disapproval, but there would still seem to be a significant lack of compliance with ILO standards.

This provides a curious contrast with the current status of EU external relations, in which we find that explicit reference is made to ILO standards relating to protection of the freedom of association. One example is the South African–EU Free Trade Agreement, Article 86(2) of which states that the parties 'recognise the responsibility to guarantee basic social rights, which specifically aim at the freedom of association of workers [and] the right to collective bargaining, …', adding that 'the pertinent standards of the ILO shall be the point of reference for the development of these rights'. A more general commitment is set out in Article 50 of the Cotonou Agreement on 'Trade and Labour Standards', which states that: 'The Parties reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organization (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining …'. However, these provisions do not seem to provide the direct basis for trade or aid conditionality and, indeed, have not to date been used in this fashion (see Chapter 9).

What is more significant, despite its relatively restrictive ambit, is the reference to ILO standards in the EU generalized system of preferences (GSP).[9] It is here that we have witnessed the concrete application of conditionality on the grounds of breach of ILO Convention Nos 87 and 98, namely the withdrawal of trade preferences from Belarus. On 15 June 2007, the ILO determined that Belarus had failed to take action to ensure protection for freedom of association, adopting a special paragraph to that effect, and on 18 June 2007, having given a six-month warning to Belarus, the EU withdrew trade preferences. The withdrawal has affected only approximately 10 per cent of Belarus exports and has not prevented their admission to the EU. It merely raised tariff levels by 3 per cent.[10] This action may have a largely symbolic effect (Orbie 2009), but questions may still be raised as to whether there is consistency of treatment of the member states who currently receive preferential treatment under EU GSP-plus, as would seem to be required under the chapeau to Article XX of the General Agreement on Trade and Tariffs (GATT) and arguably the Enabling Clause (see WTO 2004).

This may be doubtful, as at least seven of the states who have gained special incentives under what is currently GSP-plus are subject to current criticism by the

ILO Committee of Experts on the Application of Conventions and Recommendations. Colombia has at least instigated an investigation of the murder, torture and disappearance of trade unionists,[11] and a Tripartite Agreement for the Right of Association and Democracy was concluded by the Colombian government and the representatives of employers and workers in Geneva in the context of the Conference Committee on the Application of Standards, on 1 June 2006.[12] Nevertheless, there are significant concerns raised in cases submitted by trade unions in respect of the situation in Colombia,[13] and many of the other GSP-plus beneficiaries remain in breach of ILO standards by reason of the constraints that they place on trade union organization, collective bargaining and the right to strike. Indeed, ILO CEACR Reports suggest that the Committee is frustrated by the repeated criticism it has issued in this regard on which states have yet to act.[14] The GSP-plus beneficiaries are hardly paragons of compliance, which indicates that, as per EU member states, the Commission's interest lies primarily in ratification as opposed to effective implementation of ILO 'fundamental' Conventions, despite the wording of Article 9(1)(a) of the current GSP Regulation.

How, then, does the case of Belarus differ from the very limited compliance of these States? The adoption of a 'special paragraph' concerning Belarus at the ILO 95th and 96th annual International Labour Conferences seems to have been a key factor, given that this measure is reserved for the worst violations of international labour standards. Belarus has repeatedly breached undertakings made to the international community, and the Council cannot be accused of acting precipitously or without the weight of international approval. Indeed, given EU determination to link its external relations policies with those of the ILO, it would have been embarrassing had the EU not done so. In this respect, the conduct of Belarus differs from that of other less than compliant EU member states or other recipients of preferences under EU GSP.

Another factor may be the nature of the breaches of freedom of association that took place in Belarus (see Tortell 2009). The situation in Belarus is concerned directly with the protection of civil liberties and respect for the freedom of individual persons to join associations, which were then engaged in political resistance to an authoritarian and repressive regime. Socio-economic rights to collective bargaining were also compromised, but it seems that it has been the violation of civil and political rights that has generated heightened concern (ILO 2004: especially paras 598–634). The government in Belarus was involved in a campaign involving intimidation and harassment of trade unionists, including those who co-operated with the ILO Commission of Inquiry.[15] Such condemnation may be consistent with the liberal view of freedom of association taken, not only by the ECJ, but also by EU human rights instruments, which place more emphasis on individual freedom of choice rather than the strength of collective voice. This is not an intrusive attempt by the EU to rewrite collective labour law in Belarus, but merely an endeavour to generate respect for internationally recognized civil liberties. As such, EU treatment of Belarus is not as inconsistent as it might seem with the latitude that the EU social policy gives to EU member states to determine their own domestic systems of industrial relations.

Importing and exporting ILO norms relating to gender equality

The principle of equal pay for work of equal value is enshrined in the preamble of the ILO Constitution, and the more general principle of gender equality is implicit in the terms of the ILO Declaration on Fundamental Principles and Rights at Work. Gender equality receives more specific attention in ILO Convention No. 100 (which provides for equal remuneration for men and women workers for work of equal value) and Convention No. 111 (which prohibits discrimination on various grounds, including that of sex, in employment or occupation).

EU treatment of gender equality and freedom of association could not be more different. Whereas freedom of association is expressly excluded from the legislative competence of the EC, the principle of equal pay for work of equal value is expressly stated in the EC Treaty. The origins of the decision lie in the particular determination of the French government in 1957 not to suffer competitive disadvantage by virtue of its national equal pay laws (Kenner 2003: 4), but the outcome has been more extensive. What was once Article 119 EEC (and is now Article 141 EC) has provided the platform for the promotion of gender equality in EU social policy ever since the ECJ found that this Treaty provision was not merely an expression of political will, but was capable of having direct and horizontal legal effects. The ECJ has explicitly referred to the relevance of ILO Convention Nos 100 and 111 in equal pay cases, but has also stressed that gender equality can be understood to be constitutive of the terms of fair competition within the Community's internal market.[16]

There is clear legislative competence for legislative measures to be taken concerning not only equal pay but the broader need for equality. Article 141(3) EC states that measures shall be adopted 'to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation …'. Additionally, Article 13 makes provision for legislation deemed appropriate to combat 'discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The result has been considerable legislative activity,[17] as well as supplementary jurisprudence developed by the ECJ (ably outlined by Costello and Davies 2006).

Legislative strategies have been further supplemented by the use of soft law to promote gender equality. There have been initiatives to incorporate the UN practice of 'gender mainstreaming' into EU policies and activities (see Chapter 11).[18] One instance has been the attempt to secure equality objectives through the 'open method of co-ordination' (OMC) as part of the European Employment Strategy (EES).[19] The OMC envisages the setting of guidelines, review of state practice, the issue of recommendations and then the revision of guidelines to be applied afresh. Within this circular process, member states are given apparent latitude to develop their own distinctive national action plans, but are also encouraged to learn from instances of best practice and indeed follow the recommendations addressed to them (de la Porte and Pochet 2002; Zeitlin 2005). Best practice, as regards gender equality, is seen as that which gets women into work, enabling

them to play a role in the European labour market and enhancing its productivity (Barnard 2006: 306).

Concern has been voiced that the assumption that women will automatically benefit through participation in the labour market is misguided (Ashiagbor 2005: ch. 6; Ellis 2005: 22). Indeed, it may not be their interests that participation serves, but rather wider economic interests. The revision of the Lisbon Strategy in 2005, which was accompanied by the streamlined merger of the Broad Economic and Employment Guidelines,[20] suggested to some that the social dimension would become subsumed in the pursuit of macro-economic objectives. 'The prioritising of jobs and growth serves to cast social exclusion in a subservient role' (Daly 2006: 471).

A study carried out by the Employment Research Centre at the University of Manchester has observed that there has been 'a failure to develop gender mainstreaming across the new guidelines in the integration of employment, growth and macro-economic policy, which indicates that the commitment to gender equality objectives is still limited and compartmentalised' (Fagan *et al.* 2006: 573). Those conducting this study noted further that the need to reconcile work and family life is still viewed as 'an issue for women', with little attention being given to fathers' work–family adjustments or how to promote a more equal division of care in the home. The 'impact of the expansion of part-time work on the gender pay-gap or women's financial independence across a life course' is also neglected (Fagan *et al*. 2006: 586). In other words, only the economic market-driven side of the equation is receiving the full attention of the EU in its endeavour to promote productivity and growth through the achievement of a 'knowledge-based economy'. There is perhaps scope for this omission to be corrected in the light of the proposal launched by the Commission in 2007 designed to tackle the gender pay gap (European Commission 2007a).

Given the centrality of gender equality to fair competition and productivity in an EU internal market, it should come as little surprise that EU member state compliance with ILO Convention No. 100 is much more impressive than compliance with Convention Nos 87 and 98. Of the initial EU-15 member states, only Finland and the UK have been singled out for criticism by the ILO CEACR, on account of the remuneration gap that remains in those countries and in the UK treatment of part-time workers. There is, however, notably no criticism of Finnish or UK equal pay legislation *per se*, only the delivery of government policy. As regards more recent EU member states, in 2007, the CEACR commented favourably on the improved enforcement of equal remuneration in the Czech Republic and, in 2006, on the introduction of equal pay legislation by Poland. It seems that it is only Slovakia that is identified as not yet in full compliance.[21]

As regards Convention No. 111, the CEACR has observed with interest (and apparent approval) initiatives taken in France, Greece, Spain and the UK. New legislative measures taken in Hungary, Malta, Poland, Romania, Slovakia and Slovenia also received appreciative attention. Notably, there was less than full compliance by EU member states with other aspects of compliance with Convention No. 111, such as treatment of the Roma people by Bulgaria and, in Lithuania,

of persons previously engaged by the security services.[22] It is gender equality, rather than anti-discrimination law *per se*, which would seem to be a key facet of EU social policy.

Gender equality is a CLS and as such has become an aspect of EU external relations policy. This is true, as it was for freedom of association, under such instruments as the South Africa–EU Free Trade Agreement, the revised Cotonou Agreement and the current formulation of EU GSP (see Chapter 9). The EU has also pursued 'softer' development agendas in this field. For example, gender equality is to be pursued in the context of the 'European Consensus on Development' (EU 2006), such that it has been proposed that budgetary provision will be sensitive to such concerns.[23] The EU has also acted in co-operation with the ILO through joint 'pilot projects' in 2005/6 under the ILO's decent work agenda (European Commission 2006c). The EU's ambition has been stated to be 'improvement of the link between GSP and EC external assistance' (Council 2006: 6).

That said, there is little evidence of action taken by the EU in its external relations on the basis of gender equality as regards trade preferences. This may be because there has been no state that has blatantly violated the gender equality principle, but common sense renders this conclusion unlikely. It may also be explained by the reticence of the ILO to name such states as pariahs. However, it seems more likely that the cultural sensitivity of insistence on gender equality is the stumbling block. There is also a fear that introduction of any kind of 'social clause' will have the perverse effect of driving women into the informal labour market (Kabeer 2004: 31). Furthermore, while some aspects of gender equality (such as measures to ensure entry to the workforce) will be promoted by a variety of mechanisms within the EU as rigorously as possible to enhance economic productivity, the EU may have less incentive to enforce this core labour standard abroad. While ostensibly the subject of conditionality, the EU approach seems to be to encourage third states to promote gender equality because this is in their own interests, rather than to require implementation of ILO Convention Nos 100 and 111. This seems to be an approach tacitly endorsed by the ILO.

Conclusion: finding coherence?

At present, there remains limited compliance by EU member states with ILO standards relating to collective bargaining and industrial action, and such respect for ILO Convention Nos 87 and 98 as is evident in national legislation may yet be further undermined by the priority given to individual market freedoms and general market integration objectives by the ECJ. The lack of emphasis on protection of these aspects of freedom of association within the EU would seem to be at odds with the external aspect of EU social policy, such as the withdrawal of GSP preferences from Belarus on the basis of non-compliance with ILO instruments. In contrast, gender equality receives extensive legal protection within the EU and is promoted through programmatic means insofar as this is consistent with the growth and productivity of the EU internal market. However, no external action has been taken to withdraw trade preferences on this ground.

Nevertheless, it may not be appropriate to say that there is a simple mismatch between EU internal action and external relations. Instead, this chapter has suggested that there may be a hidden consistency to this picture that is revealed when one maps its contours more carefully. What one can see emerging in the EU is the use of labour standards to serve an internal market agenda by setting fair terms of competition, promoting freedom of contract and enhancing labour market productivity.

The EU may be seeking to 'export' civil liberties to Belarus that are consistent with individual freedom and market-building. This would fit with the rather individualistic interpretation of freedom of association apparent in the EU Charters of 1989 and 2000, as well as the case law developed by the ECJ. The EU's actions need not be construed as seeking to export the fuller extension of socio-economic entitlements to collective bargaining or industrial action, which is recommended in ILO jurisprudence. To this extent, its conduct is not necessarily inconsistent with its permissive attitude to breaches by EU member states (or other GSP beneficiaries) identified by ILO supervisory bodies.

Similarly, promotion of gender equality within the EU not only serves social objectives, but can be viewed as consistent with constructing terms of fair competition and building productive labour markets. It is imperative for the successful completion of the internal market. However, while the EU strongly recommends adoption of such a policy in third countries, it lacks the same motivation to compel them to do so; instead offering programmes that deliver assistance to those working on these issues.

What then are we to make of the purported co-operation between the EU and ILO, involving 'exchanges of letters' and high-level meetings. In the fifth High-Level Meeting, which was held in October 2006, there was agreement that there was 'an overall convergence between the strategic objectives and main policy objectives of the ILO and EC' (European Commission and ILO 2006: 1). This would suggest that there should not be so much coherence between internal and external EU social policy (given that there may be significant strategic differences between, on the one hand, facilitating regional market integration and, on the other hand, facilitating aid and trade relations), but that we should instead be looking towards coherence between EU and ILO policy.

However, one potential concern is that future progression along these lines belies the limited competence of the EU to act within the ILO (see Chapters 5 and 6). The EU has official 'observer' status within the ILO, but is not itself a member, nor is it possible for the EU to ratify an ILO Convention. This is technically a matter within the competence of EU member states. Where the EU exercises internal competence on a matter of social policy and thereby acquires implicit external relations competence or where it is granted explicit external relations competence (for example, in the sphere of trade or development), this can only be 'exercised through the medium of the Member States acting jointly in the Community's interest' (Hoffmeister 2007: 52).[24] The legal *status quo* arguably gives EU member states a degree of discretion, even when negotiating on policy lines within the industrialized market-oriented economy countries (IMEC) lobby group

operating in the ILO. The Commission appears to be interested in constraining the exercise of external competence by member states in a more stringent manner, as is evident from the European Commission Communication on *Europe in the World* in which states that:

> As in national administrations, even when there is sufficient political will, the EU's impact falls short when there are unresolved tensions or a lack of coherence between different policies … Unsatisfactory co-ordination between different actors and policies means that the EU loses potential leverage internationally, both politically and economically.
>
> European Commission (2006a: 6)

This desire is further evident in the Final Joint Conclusions of the fifth High-Level Meeting, which observed that 'the EU, at the initiative of the Commission and in close cooperation with the respective EU Presidencies has, in recent years, strengthened its contribution to preparation, negotiation and application of ILO conventions' (European Commission and ILO 2006: 6).

Determination by the Commission of the extent and scope of ratification of ILO Conventions may tame the potentially divisive exercise of individual member states' policy preferences, but may also have the effect of diminishing the influence of employer and worker representatives, who would otherwise gain a voice through national delegations to the ILO International Labour Conference.

Second, and this is where there may be more reason for concern, while the EU and ILO may be working together, gainfully using each other to gain legitimacy and influence, respectively, they would seem to have potentially divergent mandates and objectives. There is an admission in the records of the fifth High-Level Meeting that there are differences between these two institutions: 'Although both organizations are political in different ways they are complementary' (European Commission and ILO 2006: 3). This may, however, be a problematic understatement.

The fundamental objectives of the EU, when traced back to its origins as a European Economic Community, are primarily market oriented. Social policy has played a secondary supplementary role (Davies 1992; Barnard 1999). Despite the inclusion of an EU Charter of Fundamental Rights in the Reform Treaty, there is unlikely to be any free-standing legislative power of the EU to protect freedom of association and rights of collective bargaining, which counteract the strength of market freedoms. In contrast, since 1919, the ILO Constitution has been aimed primarily at the achievement of social justice (Murray 2001: 35–47). While economic and social objectives will not always be in conflict, to deny that this might ever be the case seems foolhardy. Indeed, Article II(c) of the ILO Declaration of Philadelphia of 1944 provides that, where the two conflict, the social should prevail. It is less clear that this is the view taken by the ECJ or even the EU political institutions.

It is possible that the EU will become more responsive to the social mandate of the ILO as a result of this new partnership along the lines of policy coherence, but

it would seem that, in this relationship, it is the ILO that is more vulnerable and therefore susceptible to policy influence. The EU possesses significant power as a regional trading bloc, which is capable of providing effective trade sanctions and incentives for compliance with the norms that it seeks to export. Since the end of the Cold War, the ILO has been placed under pressure to reform its practices and demonstrate its continuing relevance to its constituency. In the current climate of international relations, it may not be that the values of the international community are channelled via the ILO to inform the concrete policies of the EU, but rather that a powerful regional trading bloc, trading on identification with the ILO, can skew the content and relevance of internationally agreed standards. Until the EU changes its mandate, we may need to remain cognisant of these limitations and wary of eroding the social dimension of ILO labour standards.

Notes

1 Note the subsequent endorsement of this policy by the Council (2006).

2 Director General's Introduction to the International Labour Conference, 'Decent Work for Sustainable Development', ILC 96–2007/Report 1A, 15.

3 UN General Assembly Resolution A/RES/59/57, 2 December 2004. See also Ministerial Declaration of the UN Economic and Social Council E/2006/L.8.

4 Note the insertion of Article 136a EC by the Lisbon Reform Treaty and see Smismans (2007).

5 See the Lisbon Reform Treaty, Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, which states, *inter alia*, 'for the avoidance of doubt, nothing in Title IV – Solidarity of the Charter creates justiciable rights applicable to Poland and the United Kingdom except in so far as Poland and the United Kingdom has provided for such rights in its national law'.

6 Council Regulation (EC) No. 2679/98 of 7 December 1998, OJ L 337/8.

7 Directive 2006/123/EC of 12 December 2006, OJ L 376/36.

8 See reports of the ILO CEACR for 2006–7.

9 See Council Regulation No. 732/2008 of 22 July 2008 of which provides for special incentive arrangements in respect of, *inter alia*, compliance with ILO fundamental Conventions.

10 EU Press Release, 'EU Member States back Commission Recommendation to withdraw trade preferences from Belarus over labour standards', 20 December 2006; and EU Press Release, 'EU will withdraw GSP trade preferences from Belarus over workers' rights violations', 18 June 2006.

11 See Orbie (2008), who cites the statement by the European Trade Union Confederation (ETUC) relating to violations by the current fifteen beneficiaries of the special incentive arrangements, ETUC Press Release, 21 December 2005, and the statement of Trade Commissioner, Peter Mandelson, in the European Parliament, H-1052/05, 15 December 2005.

12 CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) Colombia (ratification: 1976) (published: 2006 and 2007).

13 See complaints against the government of Colombia: Case No. 2434 (2007); Case No. 2448 (2007); Case No. 2481 (2007); Case No. 2493 (2007); Case No. 2469 (2007); Case No. 2480 (2007); Case No. 2489 (2007); Case No. 2504 (2007).

14 See reports of the ILO CEACR for 2006–7. See also the following cases submitted to the ILO CFA: Case No. 2495 (2007); Case No. 2409 (2007); Case No. 2511 (2007); Case No. 2241 (2007); Case No. 2482 (2007).

15 ILO CFA, Report No. 339, Vol. LXXXVIII, 2005, Series B, No. 3, para. 89, and 341st Report, 2006, paras 51 and 53(a).
16 Case 43/76 *Defrenne v Sabena* (No. 2) [1976] ECR 455 at 472, paras 27–28; and Case 149/77 *Defrenne v Sabena* (No. 3) [1978] ECR 1365, paras 26–27. The ILO concept of equal pay for work of equal value (rather than merely equal work), as expressed in ILO Convention No. 100, was also influential in the subsequent interpretation by the ECJ of Council Directive 75/117/EEC of 10 February 1975, OJ L 45. See Case 61/81 *Commission v UK* [1982] ECR 2601.
17 Council Directive 75/117/EEC (see above); Council Directive 76/207/EEC of 9 February 1976, OJ L 39/40; Council Directive 92/85/EEC of 19 October 1992, OJ L 348/1; Council Directive 97/80/EC of 15 December 1997, OJ L 14/6; Council Directive 2002/73/EC of 23 September 2002, OJ L 269/15; and Consolidated Directive 2006/54 of 5 July 2006, OJ L204/23. See Burrows and Robison (2007).
18 See reference in this context to the 'Pact for Gender Equality', which requires extensive scrutiny of the social impact on gender of European legislation, outlined in the Presidency Conclusions of the European Council (2006: 9). For further analysis, see Millns (2007).
19 EC Treaty, Title VIII.
20 Council Decision 2005/600/EC of 12 July 2005, OJ L205/21.
21 See reports of the ILO CEACR for 2006–7.
22 Ibid.
23 See, for example: 'Equality between men and women and the active involvement by both genders in all aspects of social progress are key prerequisites for poverty reduction. The gender aspect must be addressed in close conjunction with poverty reduction, social and political development and economic growth and mainstreamed into all aspects of development cooperation …' (EU 2006: 22). See also European Commission (2007b: 6).
24 See also Opinion 2/91 regarding ILO Convention No. 170 on Chemicals at Work, Decision of 19 March 1993 [1993] ECR I-1061.

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3 EU enlargement and social standards

Exporting the European social model?

Maarten Keune

The European Union (EU) has consistently profiled itself as not only a political and economic but also a social union, as the harbinger of a social Europe. It claims to differ from the rest of the world because of its 'European social model' (ESM), thanks to which – or so it argues – Europe enjoys a distinct social quality. Social progress and social cohesion are high on the EU agenda, complementing, in theory at least, political and economic integration. High social standards are defended from both a normative and an economic point of view, the claim being that good social policy is good economic policy. This social self-assessment places the EU on moral high ground and influences its attitude towards the rest of the world. In today's world, the EU claims a normative role for itself, which includes the external dissemination of its social values and standards with the aim of raising social standards in third countries. The European Commission argues, for example, that 'The EU has a duty, not only towards its citizens and those of the new member states, but also towards its present and future neighbours to ensure continuing social cohesion and economic dynamism' (European Commission 2003: 3; see also Chapter 4).

In this chapter, the extent to which the EU is indeed actively disseminating a social model will be considered through the lens of Union enlargement and accession. To what extent or in what ways – we will be asking – has enlargement served as a vehicle for spreading EU social standards? The bulk of the analysis will focus on the question of the extent to which the EU has exported a 'social model' to those central and eastern European countries that entered the EU in May 2004, and on whether it is possible to observe positive impacts on social standards in the new member states. This will entail an examination of the social effects of the transposition and implementation of the *acquis communautaire*, taking account of the social as well as some of the economic elements of the *acquis*.

The chapter is organized as follows. First, the concept of the European social model will be considered more closely. What are the characteristics of this model and how is it enshrined in EU regulations and practices? In the next section, the weight of social issues in the accession procedure will be discussed, focusing on the character of the accession criteria with which the candidate countries were confronted, in particular the Copenhagen criteria and the hard and soft social *acquis communautaire*. Following that, the chapter will discuss the impact of the

social *acquis* on labour market and welfare state regulations and policies in the new EU member states (NMS) which entered the Union in May 2004. Finally, the chapter will discuss the social implications of some of the economic elements of the rest of the *acquis*, in particular those relating to the Single Market and European Monetary Union, and present conclusions.

The European social model

Assessment of the relationship between enlargement and the ESM depends first of all on the exact definition of the ESM. Although this concept is highly prevalent in academic and political discourse, what the ESM actually entails is rarely specified, making it an ambiguous concept to which different meanings are attached and which is used by different actors to express rather different things. Jepsen and Serrano Pascual (2006), in a discussion of the varying conceptions of the ESM, identify two major ways of understanding it: (i) the ESM as a historical *acquis*, characterized by specific common institutions, values and outcomes; and (ii) the ESM as a European political project, conceived in an effort to solve shared problems and work towards a distinctive transnational model, including common goals, rules and standards, as well as a certain degree of transnational cohesion.

Each of these highly different approaches entails very different questions about the relationship between the ESM and enlargement. The historical *acquis* approach leads to two sets of questions. One is whether the NMS are part of the ESM, i.e. whether they sufficiently resemble the EU-15 in this respect and, if so, how this has come about. Have these countries become part of the ESM through their preparation for EU membership? Have they been part of the ESM for a longer period of history? Or can they only become part of the ESM in the future? The other set of questions to emerge from this approach concerns the effect of enlargement on the ESM: will the entry of the new members have a significant effect on the social model of the EU-15 and therefore on the ESM? This approach has been discussed in other publications (Hemerijck *et al.* 2006; Keune 2006a) and will not be addressed further here.

The political project approach gives rise to entirely different questions. Have the EU's normative aspirations in the social field led to social issues carrying an important weight in the accession process? Has the EU imposed its social model upon the NMS by making elements of this model part and parcel of the conditions imposed in exchange for membership? Has accession to the EU had an important impact on the welfare states and labour markets in the NMS? These are the questions that form the core concerns of this contribution.

Before these questions can be addressed, it is essential to clarify what the ESM actually comprises. What, in other words, are the common goals, rules and standards set by this distinctive transnational model? Jacques Delors launched the notion of an ESM in the mid-1980s:

> … by designating it as an alternative to the American pure-market form of capitalism. The basic idea behind the ESM is that economic and social

> progress must go hand in hand; economic growth, in other words, is to be combined with social cohesion.
>
> Jepsen and Serrano Pascual (2006: 25–26)

The ESM concept was subsequently adopted by the European Commission, starting with the White Paper on social policy (European Commission 1994; see also Chapter 4), in which it is defined as a set of common values, including the commitment to democracy, social dialogue, equal opportunities for all, adequate social security and solidarity towards the weaker individuals in society. Since then, the European Commission has repeatedly underlined, in numerous documents and speeches, that the ESM is a key element of the European project.

However, how social *is* the European project if we move beyond such blanket statements of support? Indeed, has economic integration been accompanied by social integration? What competences does the EU have in this respect and what social regulations have been developed at the European level? And do these European-level regulations constitute a coherent ESM?

Since its inception, the EU has gradually expanded its competences in the social field. Initially, in the 1957 EEC Treaty, social policy was left to the member states; the Treaty had a pro-market bias, and its explicit legislative competences were limited to the free movement of labour (Falkner *et al.* 2005: 41). Gradually, these competences were expanded through the harmonization of health and safety standards in the Single European Act, the inclusion of a wide range of social policy areas in the 1993 Maastricht Treaty, the employment chapter of the 1997 Amsterdam Treaty, and further possibilities for co-operation between member states regarding all social policy issues included in the 2001 Nice Treaty (ibid. 41–45). Traditionally, social regulations have been 'hard' regulations, i.e. Directives. The area most extensively covered by such Directives is occupational health and safety, followed by other aspects of working conditions and gender equality and non-discrimination (ibid. 48). Directives have also dealt with freedom of movement for workers and the portability of social security rights across borders, as well as some elements of workers' participation and collective dismissals.

In the past fifteen years, 'traditional' hard regulations have increasingly been accompanied by soft regulations. These concern, in particular, the open method of co-ordination (OMC), aimed more at the definition of common objectives, exchange of experiences and learning, and covering areas such as employment, pensions and social inclusion (de la Porte and Pochet 2002; Zeitlin *et al.* 2005). In addition, the EU also plays an important role in agenda-setting in the social and labour market field, supporting the development of European-level social dialogue and stressing the importance of social dialogue at the national and sectoral levels.

Even so, in spite of the development of this important body of social regulations and competences, Community social provisions do not add up to anything remotely approaching a coherent ESM (Goetschy 2006). National governments have been very reluctant to abandon their national welfare state arrangements in favour of pan-European solutions. In accordance with the subsidiarity principle, national diversity of social systems is recognized politically, and wages,

employment, social protection and industrial relations policies largely remain matters of national responsibility, European-level regulations in these areas being fragmentary and largely complementary in nature. Compared with the national level, the set of social regulations that exists at the European level is thus very restricted and, since 2001, the adoption of social regulations at the European level has come to a virtual standstill.

In line with this fairly restricted European integration in the social field, continuing diversity can be observed between the social models of European countries. This situation is in stark contrast to the much more profound economic integration of the EU and the very extensive body of economic regulations prevailing at the European level. National governments have been irreversibly committed to European economic integration and have been prepared to transfer much of their sovereignty in this field to the European level. Indeed, the European project has been dominated by economic integration, with social integration granted no more than a secondary status (cf. Chapter 2), such that progress in this field has been decidedly piecemeal.

The weight of social issues in the accession process

The absence at the European level of a comprehensive ESM enshrined in European regulations and processes of itself sets limits on the potential weight of social issues in the accession process. This does not mean, however, that there has been no social dimension to enlargement, or that the EU has not attempted to impose social regulations on prospective members. On the contrary, during the accession process, the EU has regularly expressed its ambition to make social standards an important and integral part of the enlargement process.

Even so, the approach taken towards enlargement has been predominantly a narrow, legalistic one, based largely on fulfilment of the Copenhagen criteria and adoption of the *acquis communautaire*. The basic requirements for accession were laid down in the Copenhagen criteria. These state that candidates should be: (i) democracies, following the rule of law, respecting human rights and respecting minorities; (ii) functioning market economies; and (iii) able to take on the obligation of membership, including adherence to the aims of political, economic and monetary union. The Copenhagen criteria do not include a specific social component, with the exception of the reference to very basic human rights issues.

The *acquis communautaire* includes a series of social elements, together termed the social *acquis*, which the candidate countries were required to adopt. The social *acquis* consists, primarily, of 'hard' elements, i.e. the social Directives discussed above. Their incorporation into national regulations is compulsory. The social *acquis* also includes 'soft' elements, referring to the adoption of practices common in the EU as well as (preparation for) participation in Union processes. This refers, first of all, to social dialogue: the EU expects applicant countries to practise meaningful social dialogue and to prepare the social partners for participation in European-level social dialogue (Vaughan-Whitehead 2000). It also includes the capacity to participate in the OMCs related to employment and social inclusion.

In addition to these requirements, the EU also offered technical assistance aimed at strengthening the candidates' capacities to adopt the *acquis*, while financing development projects through the PHARE programme[1] and by other means.

Nonetheless, given the weak social dimension of the European project itself, the social dimension of accession and enlargement has been correspondingly weak, with economic issues having been granted a clear primacy over social issues. Indeed, of the twenty-nine thematic chapters that made up the annual Regular Reports that reviewed the 'progress' made by the then candidate countries in their preparation for accession, only one dealt with employment and social policies, while there were individual chapters on taxation policy, monetary policy, competition policy, company law, transport policy, the free movement of goods, etc. This is not to say that there were no social accession criteria but rather that the accession process was strongly 'economistic' in character. In other words, economic considerations completely overshadowed any social dimension.

Moreover, the fact that the EU has accorded only limited importance to social issues has meant that the door has been left open for other international players, in particular the World Bank and the International Monetary Fund. Indeed, it has often been argued that the international financial institutions, notably the World Bank, have exercised much greater influence than the EU on the reform of social policy in the NMS (Müller 2003; Ferge and Juhász 2004; Potůček 2007).

The impact of the social *acquis*

What, it might be asked, has been the impact of the accession criteria on labour market and welfare state regulations and policies in the new member states? This is not an easy question to answer. Experience in the older EU member states shows that there is no straightforward answer to questions about the impact of Union regulations on national regulations or their implementation at the national level. Falkner *et al.* (2005), in a study on the implementation of six social Directives in the fifteen EU member states comprising the Union before 2004, show that there are frequent and various types of implementation failure in relation to these Directives, and that the monitoring and sanctioning of implementation is underdeveloped and often ineffectual. What is more, the impact of EU social regulations on national institutions is varied because it is mediated by the varying degrees of compatibility between EU and national institutions as well as by varying domestic responses to adaptive pressures (Martinsen 2005). In addition, the transposition of European regulations into domestic regulations is sometimes more symbolic than genuinely geared to effecting a change in national practices (Jacoby 2002). Hence, the impact of European regulations is, to a significant extent, uncertain, both where their 'proper' transposition and implementation are concerned, as well as regarding the manner and the extent to which they undergo interpretation and alteration at the national level. In the case of the OMC processes, and other types of soft regulation, given the very nature of this type of process, this uncertainty is even more pronounced.

In this section, it will be argued that the relationship between the social *acquis* and national practices is also problematic in the new EU member states, while the

actual impact of the *acquis* varies considerably depending on the specific subject and country context. As a result, dissemination of EU social regulations, as well as their positive effects on standards in the new member states, is called into question.

The hard social acquis

Where hard regulations are concerned, first of all it is important to point out that, during the accession process, all new members underwent a lengthy harmonization process involving major adaptations of national laws and regulations, subject to close monitoring by the EU. The fact that they were subsequently accepted into membership of the Union would thus seem to constitute reasonable grounds for assuming that they have largely and properly transposed EU regulations into their national legislative corpus. Where the social *acquis* is concerned, this assumption is actually confirmed by a number of studies. Falkner and Treib (2007: 9) show that, in a sample of three social Directives (the Working Time Directive, the Equal Treatment Directive and the Employment Framework Directive), the transposition record of four of the new member states (Hungary, the Czech Republic, Slovakia and Slovenia) is good – and actually considerably better than that of the EU-15. Similarly, Leiber (2007) points out that Poland performed extremely well where the legal transposition of a sample of six social Directives is concerned.[2]

However, on its own, a good transposition record does not mean much, for two reasons. One is that it says little about the effect of such transpositions on national regulations, and therefore on national standards. The other is that transposition does not mean that regulations are implemented effectively. These two reasons will now be considered in more detail.

Transposition of Directives and national regulations

As regards the effect of the transposition of Directives on national regulations, no straightforward answer can be provided. To some extent, this is simply because no comprehensive research on this issue is currently available; but it is also because this effect varies depending on the issues at hand and the specific national context. The Directives often leave considerable space for national actors in terms of defining the specific content of national regulations, which can either be minimalist or more ambitious. As a result, defining the substance of such a transposition has, on many occasions, led to struggles between political parties and interest groups (Falkner and Treib 2007; Meardi 2007). What is more, national standards may be higher than those stipulated in the Directives, which may provide opportunities for domestic actors to press for downward adjustment in the transposition process. As such, whereas in some cases the transposition of Directives leads to a definite upgrading of national regulations, in others, the opposite can be observed. A series of examples will now be considered to illustrate these points. Although these do not allow any firm conclusions to be drawn, they do provide a picture of the varied responses to transposition requirements.

One interesting example here is the transposition of the Directive on Information and Consultation. Meardi (2007) argues that, in a number of the new member states (including Poland, Slovakia and Estonia), the transposition of this Directive, officially meant to set a minimum floor of rights for employees in the EU, has been used by governments in an attempt to undermine existing employee prerogatives. In such cases, the Directive has been used to try to replace single-channel representation systems, with the trade unions as a key employee representative, by dual systems in which ineffectual works councils would replace trade unions; this would reduce the possibility for employees to represent their interests effectively and collectively (ibid.).[3]

Conversely, in the Czech Republic, where unions were close to the social democratic government dealing with the transposition in 2000, the transposition of this Directive was designed in such a way as to have only a negligible effect on industrial relations or on the role of unions at the enterprise level (Keune 2006b). Following the amendment, works councils, previously non-existent in the Czech Republic, can be established but only in undertakings where no trade unions are present. Also, they have no collective bargaining powers, cannot call strikes and can only exercise information and consultation rights within the meaning of the EU Directive. Thus, the works councils cannot replace trade unions or exercise their core functions. This Czech version of a works council is quite clearly aimed at satisfying the EU without changing national practice in any meaningful way (ibid.).

Similarly, the transposition of the Working Time Directive led, in some cases, to fierce disputes at the national level. In Hungary, for example, under the Orbán government (1998–2002), an intense debate took place between the conservative government and the socialist opposition, together with the trade unions, on the way in which the Working Time Directive should be translated into legislation (Keune 2006b). Each side argued for an interpretation that suited their own programmes and interests, which were far apart, and the Directive was worded in such a way as to permit such differing interpretations. In the end, the government used the occasion of the transposition to strengthen the possibilities for management unilaterally to increase working time flexibility. Something similar happened in Slovakia where employers were allowed to negotiate more flexible working-time rules with their workers without union participation (Falkner and Treib 2007), while in Poland the transposition of the Working Time Directive was used to reduce overtime payments (Meardi 2007). Hence, in these three cases, the transposition of the Working Time Directive presented an opportunity to worsen rather than improve the rights and options of employees, thereby lowering rather than raising social standards. In both Slovenia and the Czech Republic, meanwhile, the results of transposition of the same Working Time Directive proved favourable to employees (Falkner and Treib 2007).

As regards EU regulations on equal treatment, the Open Society Institute (2005), in an overview report summarizing the result of country studies covering eight central and eastern European countries as well as Turkey, states: 'The EU integration process has clearly been a catalyst for improvements in the legislative framework on gender equality in the New Members and Candidate Countries'.

At the same time, Falkner and Treib (2007) show that Christian Democratic parties in both Slovakia and the Czech Republic almost succeeded in opposing the transposition of these same Directives, especially where the rights of homosexuals are concerned, and that, in the latter country, transposition is still incomplete.

Clearly, national responses to transposition requirements vary substantially and so, therefore, does the effect of such transpositions on national regulations. As a result, in some cases, national social standards are raised, while in others they are hardly affected or show a decline. Although more research is needed to obtain a more systematic view of this issue, it is already clear that the transposition of EU Directives does not always or necessarily lead to positive social effects.

Implementation

As explained above, the fact that a Directive has been transposed does not necessarily mean that the regulations in question are effectively implemented and enforced at the national level. If domestic legislation is not properly respected and applied, the social Directives, transmuted through these national regulations, may not have the intended positive effects on actual social standards. Indeed, there is little doubt that most new member states face serious implementation and enforcement deficits, attributable to a number of inter-related factors. One such factor is the relatively large size of the informal sector, in which economic and labour operations are not necessarily subservient to domestic legislation. Schneider (2003) estimates that, on average, close to 30 per cent of gross domestic product (GDP) is generated in the shadow economy in central and eastern Europe, meaning that important parts of these economies and their labour markets are not governed, totally or in part, by the constellation of formal institutions.

Another factor is the weakness of trade unions, which suffer from low membership in all new member states, and the low coverage of collective agreements. In both respects, the new member states are among the worst performers (Slovenia being an exception on both counts). Hence, collective interest representation and the defence of workers' rights are limited and often ineffectual, allowing employers to circumvent the law. In addition, implementation and enforcement are also negatively affected by under-resourced court systems and lengthy court procedures, as well as by ineffective labour inspectorates (Falkner and Treib 2007).

The soft social acquis

Concerns similar to those relating to the effects of the hard social *acquis* can be raised in connection with the soft *acquis*, i.e. the various OMCs and the soft requirements in terms of social dialogue (see Chapter 2). By its very nature, the soft *acquis* consists of instruments that aim to influence national regulations and practices in a more indirect way than the hard *acquis*, emphasizing agenda-setting, learning and policy transfer. Even so, for the EU, the soft *acquis* is of fundamental importance in achieving its social goals.

The OMCs

As regards the OMCs, the two most relevant examples here are the European Employment Strategy (EES) and the social inclusion OMC. The EES is regarded as part of the soft *acquis* insofar as it does not aim to impose specific regulations at national level (see Chapter 5); it is not entirely soft, however, in that participation by prospective member states in EES processes is actually compulsory. The EES is based on the OMC procedure and comprises '… a voluntary adaptation of national policies by involvement in a multi-level process of benchmarking, multilateral surveillance, peer review, exchanges of information, co-operation and consultation' (Schüttpelz 2004: 2). Detailed policy decisions are left to national authorities, so that what is promoted by the EES tends to be a cognitive model that aims to alter the beliefs and expectations of national actors (ibid.). Rather than constituting a comprehensive full employment strategy, the EES emphasizes supply-side problems on the labour market, its objective being to increase the flexibility, employability and activation of the labour force in the light of the claim that labour market problems originate largely in the individual characteristics of the unemployed or inactive (Watt 2004).

For the NMS, preparation for EU accession included incorporation into the EES processes. The then candidate countries started to 'shadow' the EES largely as of 1999. Together with the European Commission, they started to draw up their first joint assessment papers (JAPs) of employment policy priorities, signed in the case of most NMS in 2000–2001, and to evaluate their implementation. The JAPs state that they contain

> … an agreed set of employment and labour market objectives necessary to advance the country's labour market transformation, to make progress in adapting the employment system so as to be able to implement the European Employment Strategy and to prepare for accession to the European Union.

The JAPs present an analysis of labour market problems as well as a long list of – often vaguely formulated – commitments and tasks for the future.

The EES discourse, structure and objectives have been incorporated, to a large extent, into the employment policy frameworks of most NMS (Ferge and Juhász 2004; Schüttpelz 2004; Mailand 2005). For example, the Polish National Strategy of Employment Growth and Human Resource Developments 2000–2006 was modelled on the four pillars of the EES (Mailand 2005), while Czech employment policy was also developed on the basis of EES principles (Schüttpelz 2004). To some extent, this is attributable to the requirement that the NMS take part in the EES, but it was also in their own interest to adopt the EES discourse as funding criteria for the European Social Funds were aligned on the EES priorities. Hence, through the EES and the European Social Fund requirements, the EU exerts a clear influence on the new members in terms of agenda-setting, transfer of discourse and the imposition of a framework for national employment policy.

What is less clear, however, is the extent to which the EES has influenced the *content* of employment policy. Because of the relatively recent incorporation of

the NMS into the EES process, the impact of this process on actual policy is not currently easy to assess. Mailand (2005) suggests that, in Poland, the impact of the EES on policy content is much more limited than its influence on the way policy is framed and structured. Schüttpelz (2004), meanwhile, argues that, as in the EU-15, there is a gap between strategic orientations and implementation. For their part, Ferge and Juhász (2004: 242) show that, although successive Hungarian governments have followed the EES discourse on the importance of giving precedence to active rather than passive labour market policies, the funds spent on active measures are actually quite limited. In Estonia, expenditure on labour market policies was increased after 2004, thanks to the involvement of the European Social Fund, and grew by 54.8 per cent in 2005, compared with 2004 (Helemäe and Saar, forthcoming). In spite of this increase, the proportion of GDP devoted to labour market policies, including EU funds, amounted to a mere 0.15 per cent, which is extremely low compared with the average of 2.33 per cent for the EU-15. This last point can be generalized to apply to most of the new member states. Although in the context of their participation in the EES all NMS acknowledge the crucial importance of labour market policies, expenditure on such policies, as a percentage of GDP, remains very low and far below the average for the EU-15 (with the exception of Slovenia), and nor is there any structural upward trend (Keune 2006a).

In the short term, therefore, participation by the NMS in the EES would seem to have had more impact on discourse than on policy. Of course, in the longer term, participation in the EES may actually change NMS policy-makers' ideas about what constitutes good policy which, in turn, could lead to changes at the level of policy content. Experience from the EU-15 shows, however, that this is not invariably the case.

Turning now to the OMC on social inclusion, here too the EU has played an important role in agenda-setting and in the transfer of discourse and processes. As stated in an evaluation by the European Anti-Poverty Network, this OMC

> … permitted also to introduce this crucial issue in the new Member States which has allowed for the first time a full picture of the reality of poverty and exclusion in the new member states. The OMC has been essential for giving a visibility to the issue of poverty and social exclusion within EU debates and developments and for ensuring that there is an understanding of the multi dimensional nature of poverty and not just a focus on employment as the answer to the problem of poverty and social exclusion.
>
> EAPN (2005)

Doubts remain, however, concerning the actual impacts at national level. First, and most importantly, the expenditure on social protection as a percentage of GDP has been, and remains, low in the NMS in comparison with the EU-15: the Baltic States are the lowest spenders in Europe – below 50 per cent of the EU average – but Slovakia, Hungary, the Czech Republic and Poland are also among the lowest spenders in the EU (Keune 2006a). Here, as in the case of labour market policies,

the sole exception is Slovenia where social expenditure is below but close to the EU average.[4] No positive effect on this low level of expenditure has been recorded as a result of participation in the accession process, the first years of membership or the high economic growth rates experienced by the new members since 2000.

In the context of their participation in this OMS, the NMS were required to draw up action plans to identify the key problems and policy measures to combat poverty and social exclusion. These plans have not, however, always resulted in clear commitments, detailed policy programmes or allocation of the necessary financial resources, as can be illustrated by the example of the Czech Republic. In a discussion of the elaboration and implementation of the Czech National Action Plan on Social Inclusion, Potůček (2007) shows that the document sums up a range of policies, action plans, strategies, programmes and governmental decrees of relevance to social inclusion. Yet he argues that the 'soft spot of the document is the lack of explicit goals, a poorly defined responsibility for implementation, and missing links to the budgetary process' (Potůček 2007: 24). Hence, without clear goals and allocation of resources, the Action Plan is unlikely to have much tangible impact on social policy. What is more, although the Czech Republic encountered no significant difficulties in participating in the OMC process as such, the likelihood of any real outcome is made even more remote by the presence of serious weaknesses in the Czech public administration's capacities to develop and implement strategies in this area – weaknesses that include, in addition to those mentioned above, a lack of programme evaluation, poor inter-sectoral co-ordination and limited training of civil servants (Potůček 2007).

Social dialogue

In the other major element of the soft social *acquis*, i.e. social dialogue and industrial relations, impacts also seem to be limited. From the very start of the accession process, the EU has underlined the need for candidates to strengthen social dialogue and improve the capacities of the social partners. In the regular reports drawn up to evaluate candidates' progress, the Commission repeatedly criticized a number of the governments of the then candidates for not doing enough to stimulate social dialogue, and demanded additional efforts in this respect. In the case of Hungary, for example, the Commission regularly stated that it judged the state of social dialogue to be insufficient: at a decentralized level, such dialogue was largely absent; there was a need for sectoral-level bargaining; and the government should take steps to ensure that the social partners would be prepared to participate in the European Social Dialogue (Keune 2006b). Although the Commission also continuously emphasized that the government should make additional efforts to ensure that real dialogue would take place and would be followed up in the appropriate manner, its criticism had little direct consequence – apart from the 'naming and shaming' aspect – insofar as no sanctions were attached.

Apart from 'naming and shaming', the main EU instruments designed to foster the strengthening of social dialogue in the NMS have been the participation of these states in inter-sectoral and sectoral European social dialogue, the

participation of social partners in preparing the National Action Plans (NAPs) required under the EES processes and the promotion of social pacts in the process of convergence with a view to monetary union (Meardi 2007).

Evaluating these instruments, Meardi (2007) argues that there would seem to be no meaningful social partner inputs in the NAPs for the EES, nor can such input be observed in the national strategies for entry into the European Monetary Union. The participation of social partners in inter-sectoral and sectoral European social dialogue appears to be the only development that may have had a substantial effect in promoting social partners' capacities, especially at the sector level (ibid.). All in all, however, the EU's discourse on the importance of social dialogue and its critique of the actual situation in the NMS have not been matched by correspondingly meaningful sanctions or forms of support likely to result in a clear positive impact on the state of social dialogue.

Nor, indeed, can any strengthening of the social dialogue be observed: social partners in most new members are relatively weak; they suffer from low and declining membership and exercise only limited influence on government policy. The coverage of collective bargaining is also low, and collective agreements are mostly concluded at decentralized level, with the sectoral level remaining largely absent. Once again, Slovenia is an exception here and, once again, this fact has no apparent connection with EU policies and processes.

The soft elements of the *acquis* seem to have been successful in terms of agenda-setting on the issues of employment, social inclusion and social dialogue. While this is an achievement that should not be underestimated, nonetheless, serious doubts can be expressed as to the extent to which policy has been substantially influenced, or the requisite resources have been assigned to, these important areas. This in turn raises questions as to the overall effectiveness of the soft *acquis* in achieving its objectives in the new member states.

The social impact of the economic *acquis*

A final issue to consider here relates to the (potential) social effects of other elements of membership obligations that do not directly concern employment or social policies. This applies especially to the economic *acquis* which, as mentioned earlier, is much more extensive, detailed and binding than the social *acquis*. In this text, two dimensions of the economic *acquis* are of primary importance.

The first concerns the overall importance attached to the development of the Internal Market through the liberalization and deregulation of the national economies, the 'four freedoms' (free movement of capital, goods, services and people) and the fostering of competition. The advancement of this type of economic integration has led to pressure on wages and working conditions in Europe (see the contributions in Galgóczi *et al*. 2006; Keune 2006c; Bohle forthcoming). On the one hand, this pressure derives from the strengthened exit options available to capital, in particular multinational companies, through relocation. By threatening to relocate their activities, companies increasingly and successfully demand concessions from workers in terms of wage moderation, increased flexibility and

extension of working time, in exchange for job security. This kind of scenario is not restricted to the western European countries but increasingly affects the new members too as multinationals threaten to move their activities even further east. In such cases, therefore, increased economic integration weakens the bargaining strength of workers, leads to downward pressures on wages and working conditions, and makes it more difficult for workers to share the benefits of economic growth.

This pressure is further strengthened by the fact that the EU's economic model fosters regime competition, i.e. competition between countries and regions for investment. A major element of this regime competition is a drive to offer investors a more deregulated labour market with a cheaper and more flexible labour force. Indeed, many governments have attempted to liberalize labour regulations to this end, in particular in the larger NMS which are in fierce competition with each other (Bohle forthcoming).

The second highly relevant dimension of the economic *acquis* is European Monetary Union (EMU). All new EU members are required to enter EMU at some point, even though no specific entry date has been set, and recently Slovenia was the first NMS effectively to join. Preparation for and participation in EMU is a serious challenge for the new members and is having, or is expected to have, a profound impact on their policies, politics and public institutions (Dyson 2006). Two of these effects are of particular interest to this chapter.

One is that entry into EMU means that the individual countries lose certain instruments for adjustment to economic imbalances and shocks, in particular the exchange rate and the interest rate. As such, they have to rely more on other available adjustment mechanisms in case of asymmetric shocks, in particular wage flexibility, labour market mobility and/or fiscal policy (Dyson 2006: 20). Insofar as this means pressure for greater flexibility in collective bargaining and in the labour market, it poses an obvious challenge to social solidarity (ibid.), the likely effect being that the weaker groups in the labour market will see their relative position worsen, with the ensuing risk of increased working poverty and social polarization.

The other effect is that EMU entry implies strict inflation, public expenditure and public debt criteria. The inflation criterion as such adds to the above-mentioned pressure for wage moderation, which is further increased, where the public sector is concerned, by the deficit and debt criteria. In addition, as shown by Rhodes and Keune (2006), the EMU criteria put pressure on public expenditure in general and social expenditure in particular. Hence, decreasing social expenditure and a subsequent increase in poverty and inequality are some of the possible effects of preparation for and entry into EMU. This applies particularly to those new members that suffer from the combination of high budget deficits and/or high public debt with high social risks, i.e. Poland, Slovakia and Hungary. It comes as no surprise that these countries have recently begun to delay their planned entry into EMU because of opposition from certain sections of the population to the austerity programmes required to meet EMU criteria.

The new members without serious problems in terms of deficits and debt, i.e. the Baltic countries, face less pressure of this kind. However, considering that

today their levels of social expenditure are very low and their levels of inequality and poverty are among the worst in Europe, EMU entry may well foreclose the future option of increasing welfare spending and improving these countries' social situation in this way.

Conclusions

The EU claims that it wants to play a role in advancing social standards in today's world and in providing a social dimension to globalization. But to what extent does it really do so? In this chapter, this question has been considered in the context of the EU's largest ever round of enlargement in 2004, the aim being to clarify to what extent the Union has exported a 'social model' to the countries concerned and whether this has positively affected social standards in the new members. A number of conclusions can be drawn from the above analysis.

First, it was argued that the European project in general, and enlargement in particular, are dominated by the concern to achieve profound economic integration, and that meanwhile social integration has been piecemeal. Social regulations are largely a national affair, and European social regulations are fragmentary and largely complementary to national regulations – they certainly do not add up to anything approaching a 'social model'. As the accession process was based largely on the transposition and implementation of the *acquis communautaire*, from the outset the weight of social issues in this process has been limited.

Second, it has been argued that the available evidence suggests that, as in the EU-15 (Falkner *et al.* 2005; Martinsen 2005), the impact of EU-level social regulations and processes on national regulations and practices is subject to a series of implementation failures and is mediated by the particular responses of domestic actors to the accession requirements. Indeed, where the hard *acquis* is concerned, EU regulations have proved themselves open to domestic interpretation and have sometimes become sites for domestic struggle between actors with differing ideas or opposing interests. What is more, while transposition of the social *acquis* has led to the raising of standards in some cases, in others the standards have declined or remained unaffected because of '*pro forma*' transpositions. In addition, although domestic actors have participated in the processes stemming from the soft *acquis,* and in many cases have adopted the corresponding EU discourse, they have often not translated this into domestic policy changes. Such national responses are possible because of the very nature of the hard and soft social *acquis* as well as of the absence of effective monitoring and sanctioning mechanisms. Accordingly, national actors may be in a position to seriously limit the impact of the social *acquis* in their domestic context.

This impact is further restricted by the fact that, in the NMS, the informal sector is relatively large. National regulations are not properly respected in this sector of the economy, thereby further limiting any potential impact of EU regulations.

Finally, it has been shown that the adoption of other elements of the *acquis communautaire*, in particular the requirements related to the Internal Market and to EMU, have led, or are likely to lead in the near future, to serious negative social

effects in the new members. These include pressure for wage moderation and further flexibilization of the labour market, a weakening of the bargaining position of workers and pressure on social expenditure.

These effects, combined with the limited weight of the social *acquis* and its implementation problems, suggest that rather than improving social standards in the new member states, the requirements stemming from EU membership are likely to exert downward pressure on these standards. Indeed, in the context of enlargement, the EU emerges as a weak transnational actor in the social field – one with a mixed record where the export of social standards is concerned, and whose main emphasis remains consistently set on economic integration to be achieved by liberalization, deregulation and competition.

Notes

1. The PHARE programme provides financial assistance for candidate countries in the context of enlargement.
2. This does not mean that transposition is perfect, and both studies point to some transposition deficits. Also, in certain cases, transitional periods were agreed to allow the new members sufficient time to adapt their national regulations and establish the necessary implementation structures.
3. These attempts to reduce employees' rights were not always successful as they prompted opposition from trade unions and other domestic actors (Meardi 2007).
4. In both cases, this is a reflection of the co-ordinated character of the Slovenian model of capitalism (Feldmann 2006) rather than of participation in European processes.

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4 The social dimension of EU neighbourhood policies

Sieglinde Gstöhl

In order to realize its vision of 'a social Europe in the global economy', the European Union (EU) aims not only to modernize the European social model but also to 'disseminate, beyond the borders of the Union, the EU values and experience of a model of development combining economic growth and social justice'.[1] Even though this social model 'cannot simply be transposed to other parts of the world', the European Commission (2004b: 2) considers certain aspects are of interest to the Union's partners. It has declared 'the incorporation of the European social model into external dialogue and measures at bilateral, regional and multilateral level' as an objective of external relations and seeks co-operation on this issue 'firstly with the candidate countries, neighbouring countries and other third countries, …; secondly with international organisations like the ILO, OECD and UN and with organisations involved in economic governance (IMF, World Bank, WTO), in order to take greater account of the social dimension of globalisation and the social pillar of sustainable development' (European Commission 2005: 5).

This chapter investigates why, how and to what extent the EU attempts to 'export' its own social model to neighbouring countries that are not (potential) candidates for EU membership, in particular those participating in the European Neighbourhood Policy (ENP) to its east and south, as well as the members of the European Free Trade Association (EFTA).[2] It will show that the EU's goal as regards the European Economic Area (EEA) with the EFTA countries was the establishment of a well-functioning, homogeneous and Europe-wide market, while the ENP's primary objectives are stability and security at the Union's borders. These overarching goals also shape the social ambitions of the two approaches. The EEA extended the internal market, including most of the social *acquis* at the time, to EFTA, whereas the social dimension of the EU's relations with the other neighbours[3] has been much narrower, even though the ENP encourages further social reforms.

The means to achieve the objectives of the two neighbourhood policies are also quite different: the EEA is based on institutionalized political and legal mechanisms, whereas the ENP relies on incentives and instruments of persuasion. As a result, the extent of the EU's social 'policy export' varies – in the EEA, it comes close to the level of enlargement, while in the ENP, it is more limited and differentiated. In both cases, the EU's commitment to social goals pales besides its market-oriented objectives (see also Chapters 2 and 3).

In spite of its widespread use, the concept of a 'European social model' is still ambiguous and lacks a coherent, commonly agreed definition. The Commission's 1994 White Paper on Social Policy defined the Europen social model as a set of shared values, including 'democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity', which 'are held together by the conviction that economic and social progress must go hand in hand' (European Commission 1994: 2). In other words, policies for growth and competitiveness must be combined with social cohesion. The model embraces not only Community social law (e.g. workers' rights) and the Charter of Fundamental Rights, but social dialogue and the open method of co-ordination applied in the framework of the European Employment Strategy. For the purpose of this chapter, the social dimension refers in particular to labour standards, gender equality, social security and decent work. According to the European Commission (2001: 10–11), 'respect for labour standards is an integral element of the European social model …, ranging from standards on health and safety at work to equal opportunities and non-discrimination'.

The EU's insistence on an external social dimension is somewhat puzzling. First, the policies dealing with employment, social protection and industrial relations have largely remained national competences, while a variety of national social models, complemented by EU rules, exists in Europe. Second, the Union has taken a more emphatic interest in the promotion of labour standards abroad than in the implementation of the International Labour Organization's (ILO) norms within its member states (Novitz 2005: 241).[4] Third, the EU unmistakeably constitutes a global trade power, but how can it influence domestic issues such as social policy in third countries or, put differently, how can a 'policy export' actually combine both economic and social progress?

The following section investigates the ENP's social dimension, its goals, instruments and the extent of a 'policy export'. To be able to assess properly the Union's relations with the ENP countries, a comparison with another group of EU neighbours, the EFTA countries, would appear useful. Therefore, the third section briefly examines the role of social policy in the EEA. The analysis is based primarily on the available documentation, including bilateral agreements and ENP Action Plans. The final section draws some conclusions about the EU's 'social clout' in its neighbouring regions.

The social dimension of the ENP

The ENP was created in view of the EU's 2004 enlargement in order 'to avoid drawing new dividing lines in Europe' and 'to develop a zone of prosperity and a friendly neighbourhood' (European Commission 2003: 4). It embraces sixteen countries: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and the Ukraine.[5] The ENP builds on the EU's existing relations with these countries: the Euro-Mediterranean Association Agreements (EMAAs) and the Partnership and Co-operation Agreements (PCAs) with the eastern countries.

Social goals of the ENP

The Barcelona Declaration of 1995, which established the Euro-Mediterranean Partnership (EMP), stated that 'turning the Mediterranean basin into an area of dialogue, exchange and co-operation guaranteeing peace, stability and prosperity requires a strengthening of democracy and respect for human rights, sustainable and balanced economic and social development' (Euro-Mediterranean Conference 1995).

The EMP consists of three baskets of measures: a political and security partnership, an economic and financial partnership, and a partnership in social, cultural and human affairs. In the economic basket, the Association Agreements concluded in the Barcelona Process provide for the gradual implementation of a Euro-Mediterranean Free Trade Area for manufactured goods by 2010. The third basket deals with the social and cultural dialogue between the two shores of the Mediterranean and was originally considered as one of the main innovations of the EMP. However, in contrast to the market-creating aspects, this dialogue has remained 'a sleeping beauty' (Schumacher 2005: 282) because of structural deficiencies such as vague provisions, incoherence in its coverage (e.g. the fight against illegal immigration, terrorism and drug trafficking in the framework of social co-operation) and a lack of integration with the other two baskets. Of the ten priority areas stressed in the Barcelona Declaration's follow-up work programme, only four – media, youth, dialogue between cultures, and cultural heritage – have attracted any attention, but not social development (Schumacher 2005: 283).[6]

To varying degrees, all the EMAAs lay down provisions on the equal treatment of workers, social dialogue and co-operation. The agreements with Algeria, Morocco and Tunisia include articles on non-discrimination between workers of EU member states and the associated country concerning working conditions, remuneration and dismissal, as well as social security. Israel's agreement also includes the co-ordination of social security regimes. Economic co-operation focuses on areas likely to bring the economies closer to the EU as well on intra-regional co-operation. The stated objective of all agreements (except that of Israel) is sustainable economic *and* social development.

The PCAs with the transition countries to the east grant no preferential treatment for trade. The parties basically apply most favoured nation status to one another with respect to tariffs. The agreements with the Ukraine, Moldova and Russia feature a possibility of free trade as soon as circumstances permit, yet without a timetable.[7] The PCAs state that the partnership aims, *inter alia*, to provide a basis for social co-operation and that measures will be designed to bring about economic and social reforms guided by the requirements of sustainability and harmonious social development. They contain specific provisions on the non-discrimination of nationals regarding working conditions, remuneration and dismissal as well as on social co-operation with the aim of improving the health and safety of workers, social protection and technical assistance with regard to employment. In addition to these identical provisions, the agreements with Moldova and the Ukraine – unlike those with Armenia, Azerbaijan and Georgia – foresee

the conclusion of agreements for the co-ordination of their social security systems for workers.

These differences between the bilateral agreements reflect the countries' individual level of development and their number of migrant workers in the EU. It also reveals which countries the Union perceived as being closer to Europe at the time of negotiation. Overall, the eastern PCAs feature more far-reaching social goals than the Mediterranean associations (except for Israel), in particular with regard to the non-discrimination of workers and social security. Within the two regions, the Maghreb's agreements are more ambitious than those with the Mashrek countries, and the provisions for Moldova and the Ukraine are more elaborate than those for the South Caucasian countries.

With the ENP, the Union aspires to develop a 'ring of friends' to its east and south by exporting security, stability and prosperity (European Commission 2003: 4). It considers that 'democracy, pluralism, respect for human rights, civil liberties, the rule of law and core labour standards are all essential prerequisites for political stability, as well as for peaceful and sustained social and economic development' (European Commission 2003: 7) and that 'the EU *acquis* offers a well established model' on which to build, *inter alia*, common labour standards (European Commission 2003: 9). In its first ENP Strategy Paper, the European Commission announced, with regard to the future Action Plans, that:

> Enhanced dialogue and co-operation on the social dimension will cover in particular socio-economic development, employment, social policy and structural reforms. The EU will encourage partner governments' efforts aiming at reducing poverty, creating employment, promoting core labour standards and social dialogue, reducing regional disparities, improving working conditions, enhancing the effectiveness of social assistance and reforming national welfare systems.
>
> European Commission (2004a: 14)

The ENP Action Plans adopted since 2005 are country-specific political documents that jointly define the reform priorities for the next three to five years. The current twelve Action Plans[8] state in the introductory part that their implementation will significantly advance the approximation of the partner countries' legislation, norms and standards to those of the European Union[9] and help promote both economic growth and social cohesion. Moreover, except for Tunisia's Action Plan, they declare as an objective further integration into European economic and social structures.

The following subsection looks at how the EU attempts to achieve these social goals in the ENP.

Instruments for the promotion of social goals in the ENP

In return for political, economic, social and institutional reforms, the ENP holds the promise of enhanced preferential trade relations, a 'stake' in the EU's internal

market, improved interconnections with the Union (e.g. energy, transport, telecommunications), EU participation in regional conflict prevention or resolution, alignment with declarations of the Common Foreign and Security Policy (CFSP), people-to-people exchanges, participation in selected EU programmes and agencies, as well as increased financial and technical assistance (European Commission 2004a: 14).

As summarized in Table 4.1, the ENP comprises both incentive-based tools, aiming to change partners' cost–benefit calculations, and deliberative instruments based on debate and frequent interaction at multiple levels (cf. Gstöhl 2008a). Whereas the incentives attempt to induce the neighbours to embark on reforms out of rational self-interest, deliberation aims to change preferences in the target countries through discourse and persuasion. In other words, countries adopt EU norms either because they want to obtain the rewards that come with the policy import (respectively avoid the costs of non-compliance) or because they view these norms as appropriate and legitimate and thus internalize them.

The positive and negative measures are linked by the principle of conditionality: the Union may withhold certain 'carrots' and apply certain 'sticks' if crucial conditions are not fulfilled by a partner country. However, the EU has a longstanding preference for positive rather than negative measures in its external relations (cf. Balfour 2006). There is also a connection between deliberation and incentives as, according to the principle of differentiation, the level of common values will affect the extent to which the ambitions are shared (European Commission 2004a: 3). In other words, the ENP countries are not dealt with as a group, but the EU takes individual progress into account. In all the Action Plans, differentiation is spelt out in similar wording, stating that the level of ambition of the relationship will depend on the degree of commitment to common values as well as the capacity to implement jointly agreed priorities, and that the pace of progress

Table 4.1 EU instruments of social policy export in the ENP

	Incentives	*Deliberative instruments*
Positive measures ('carrots')	Trade preferences (human rights clause in trade agreements and in the GSP regulation), financial aid (human rights clause in aid regulations), 'stake in the internal market', [EU membership as hidden incentive]	Joint ownership, political and social dialogue, benchmarking (ILO and EU social standards), legal approximation to social *acquis* with twinning and TAIEX peer exchange, people-to-people exchanges
Negative measures ('sticks')	*Ex ante* conditionality, suspension of trade preferences or of financial aid, economic or political sanctions, delay in negotiations	Suspension of dialogue, expert assistance or people-to-people exchanges, 'naming and shaming', peer pressure

of the relationship will acknowledge the partner country's efforts and concrete achievements in meeting those commitments. The common values that ENP countries are expected to share embrace the 'respect of human rights and fundamental freedoms, including freedom of media and expression, rights of minorities and children, gender equality, trade union rights and other core labour standards' (European Commission 2004a: 13).

The incentives tend to favour economic issues, whereas political and social progress essentially has to count on deliberative instruments. The incentives comprise human rights clauses in bilateral trade agreements or in autonomous trade and aid regulations and, arguably, a 'hidden' membership perspective by leaving the question of future accession for the eastern neighbours open. The negative measures may consist of a suspension of these potential benefits, *ex ante* conditionality and delay in negotiations or other kinds of sanctions. The EMAAs do not require adherence to ILO-equivalent labour standards, but they contain a clause defining respect for democratic principles and fundamental human rights as an 'essential element' of the agreement. In case of a violation, either side could thus take 'appropriate measures', including a suspension of the agreement.

Most of these clauses mention the Universal Declaration of Human Rights which, for instance, comprises the right to favourable conditions of work, to social security or to equal pay for equal work. Moreover, even though, in principle, the clauses cover the full spectrum of human rights, in the practice of the EU institutions, they have only been invoked in relation to civil and political rights but not social, economic and cultural rights, with the exception of labour rights violations (Bartels 2004: 386).[10] This observation also holds true for the agreements with the eastern partner countries. The PCAs' almost identical human rights clauses consider the respect for democracy and human rights, as defined in particular in the United Nations Charter,[11] the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of market economy, as 'essential elements'. The reference to market economy principles was added for the transition countries, even though it is seen as having no direct connection with human rights (European Commission 1995: 4).

A 'stake in the internal market' is a long-term objective and a gradual, tailor-made process. The internal market tackles many behind-the-border issues beyond trade in goods and services, such as the removal of non-tariff barriers to trade, free movement of capital and persons, as well as many horizontal policies such as competition, intellectual property rights or government procurement rules. In late 2006, the European Commission (2006a: 3–4) announced its intention to negotiate a new generation of 'deep and comprehensive free trade agreements' with all ENP partners, covering substantially all trade in goods and services 'including those products of particular importance for our partners'. The first negotiations of an enhanced agreement were launched with the Ukraine in March 2007, but the establishment of a free trade area will only be negotiated once the Ukraine has acceded to the World Trade Organization (WTO).

With the unilateral Generalized System of Preferences (GSP), the EU grants developing and transition countries (non-reciprocal) duty-free access or tariff

reductions for a range of products. Armenia, Azerbaijan, Egypt, Georgia, Jordan, Lebanon, Libya, Morocco, Moldova, Syria, Tunisia and the Ukraine are full beneficiaries of the GSP. However, sectors that have proven to be internationally competitive may graduate (i.e. tariff preferences are removed). This is the case for mineral products from Algeria. Belarus has enjoyed full GSP preferences until recently but, as the country did not comply with its ILO obligations relating to freedom of association for workers, its trade preferences were withdrawn as of June 2007. Further, a special incentive arrangement for sustainable development and good governance (GSP-plus) provides supplementary benefits in terms of duty-free access to all the products covered by the general GSP (see Chapter 9). It expects them to abide by sixteen core human and labour rights UN and ILO conventions (e.g. elimination of child labour, forced labour and discrimination against women, equal pay for equal work, freedom of association and the right to organize and bargain collectively). Only Georgia and Moldova currently benefit from GSP-plus.[12] However, trade unions have noted deficiencies in the implementation of core labour standards, in particular with regard to discrimination against women (and Roma in Moldova) in the labour market, child labour and trafficking in human beings (ICFTU/WCL/ETUC 2005: 27–30, 45–50). The other ENP countries have not applied for this special incentive arrangement, as either they do not qualify as vulnerable economies or they have not ratified the international conventions required. New requests may by submitted to the European Commission by late 2008.

The EU also inserts human rights clauses in its financial aid regulations in support of third countries.[13] Both the TACIS programme for Eastern Europe, the Caucasus and Central Asia (1991–2006) and the MEDA programme in favour of the Mediterranean countries (1996–2006) defined respect for human rights and democratic principles as ‘essential elements’, the violation of which could justify the adoption of appropriate measures such as the suspension of funds. These aid regulations were replaced in 2007 by the European Neighbourhood and Partnership Instrument (ENPI) which supports, among other areas, policies to promote social development, social inclusion, gender equality, non-discrimination, employment and social protection, including protection of migrant workers, social dialogue and respect for trade union rights and core labour standards, with 11.18 billion euros for the period 2007–13. Article 28 deals with the suspension of aid where a partner country fails to observe the EU’s values.[14] In such cases, Community assistance shall primarily be used to support non-state actors working for the promotion of human rights and democratization in that country. For example, the EU provides funding for democratic forces and civil society in Belarus. Moreover, the ENP countries may benefit from general EU programmes, such as the European Instrument for Democracy and Human Rights (EIDHR) or the thematic programmes of the Development Co-operation Instrument (DCI) (see Chapter 11).[15]

Ultimately, there might be a ‘hidden membership perspective’ that motivates the reform efforts of the European ENP countries. Even though accession is officially not on the agenda, the EU is leaving this issue in a state of ambiguity. In the Action Plans of the three South Caucasian countries, the Union ‘takes note’

of their European aspirations, while in the case of Moldova and the Ukraine, it 'acknowledges' them.

Besides excluding Belarus from the GSP trade preferences, since 2004, the Union has applied restrictions on admission to the leadership of the Transnistrian region of Moldova and, early in 2006, suspended political contacts and co-operation with the Hamas-led Palestinian government. Moreover, it employs an *ex ante* conditionality towards the three ENP countries which, for political reasons, have no bilateral agreements in force yet. In 1997, the EU reacted to the democratic setbacks in Belarus by freezing the ratification of the PCA signed in 1995 and restricting ministerial-level contacts and the scope of EU assistance to Belarus. Belarusian government officials are also subject to a visa ban and asset freeze. To qualify for participation, the country needs to establish a democratic form of government, following free and fair elections. Following the suspension of UN and EU sanctions in 1999, Libya acquired observer status in the Barcelona Process and was invited to join the EMP as soon as the UN Security Council lifted the sanctions. This happened in 2003, but Libya still needs to accept the Barcelona *acquis* in full and negotiate an EMAA. Syria finalized negotiations for an Association Agreement in 2004, but EU signature is pending Syria's co-operation with regard to regional stability, in particular concerning Lebanon.

The second type of tools, the deliberative instruments, draw on persuasion and aim at convincing partners of the appropriateness of the (social) *acquis*, building mutual confidence and promoting learning processes. The ENP is based on the principle of joint ownership: the Union does not seek to impose reform priorities on its partners, but these are set jointly in the Action Plans, and their implementation is followed up interactively by joint monitoring (European Commission 2004a: 8, 10).

In addition to a general political dialogue, a regular dialogue on social matters (such as working conditions, migration, illegal immigration and equal treatment) is foreseen in the associations with Algeria, Egypt, Jordan, Lebanon, Morocco and Tunisia, while the social dialogue with Israel covers more specifically social problems of post-industrial societies (e.g. unemployment, rehabilitation of disabled people, equal treatment of men and women, work safety). The Agreement with Palestine features no such provision. With the exception of Israel, Lebanon and Palestine, the EMAAs foresee the setting up of a working party on social affairs. These working groups have been established and assist in following up the implementation of the Action Plans. The PCAs do not explicitly speak of social dialogues but focus more generally on political dialogue (including democracy and human rights) and legal approximation in economic areas. For the eastern partners, social dialogues were only introduced later in the Action Plans. Indeed, with the exception of the Action Plans of Armenia and Palestine,[16] all the ENP partners are to engage in dialogues on employment and social policy.

An important element is benchmarking, which uses, for instance, ILO and EU social standards. A few countries (Azerbaijan, Moldova, Morocco, Tunisia and the Ukraine) explicitly state their intention in their Action Plans to ensure a closer approximation to EU standards in the area of social policy (such as gender

equality, labour law, and health and safety at work). The Action Plans of the eastern ENP countries require them to continue efforts to ensure trade unions' rights and core labour standards, based on European standards and in accordance with relevant ILO Conventions.[17] The Action Plans of the Mediterranean ENP countries (except for Israel and the Palestinian Authority) commit them to developing a dialogue on fundamental social rights and to enhancing the effective implementation of core labour standards, as defined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and related ILO Conventions (see Chapter 1). All ENP countries (except for Israel) are called upon to ensure equality for men and women and to enhance women's participation in political, economic and social life as well as to enhance the protection of children's rights (and eliminate child labour). In recent years, the EU and the ILO have strengthened their co-operation on external assistance to third countries, and the neighbourhood policies 'offer important possibilities for ILO–EU co-operation as the needs for social and economic reform and for modernizing labour relations are very high in a number of countries' (Delarue 2006: 113). The ILO has developed decent work programmes in several ENP countries that may facilitate co-operation with the EU. Moreover, all ENP agreements include provisions on financial co-operation and, except for Israel and Palestine, propose projects in the fields of promoting the role of women, improving social protection and health care systems, or reducing migratory pressure.

All agreements aim at reducing divergences in standardization and conformity assessments by encouraging the use of European (economic) standards and procedures. The approximation of law is in some cases referred to as mutual undertaking (Egypt, Israel, Jordan, Lebanon), and sometimes the associated country is more directly expected to align itself with Community legislation (Algeria, Armenia, Azerbaijan, Georgia, Moldova, Morocco, Palestine, Tunisia, the Ukraine). Two ENP instruments that are designed to support administrative reform and alignment with EU practice have been copied from the EU's enlargement toolbox. The Technical Assistance and Information Exchange (TAIEX) programme provides short-term technical assistance and advice on the approximation, application and enforcement of legislation by sending experts to a country or organizing study visits and training. Besides civil servants from the legislative, executive and judiciary authorities, the target groups also include representatives of the social partners. Progress is monitored through peer reviews and database tools. Twinning also provides peer assistance but takes a longer term approach. Experts from EU member states, who are practitioners in the implementation of the *acquis*, are seconded to ENP partner countries. Twinning thus involves a peer-to-peer exchange of public sector expertise. At the end of 2006, more than twenty activities had already been requested under TAIEX, and more than 100 twinning programmes were being prepared (European Commission 2006c: 6).

People-to-people exchanges are intended to provide EU citizens and those of neighbouring countries with 'more opportunities to interact, and to learn more about each others' societies and understand better each others' cultures' (European Commission 2006a: 6). Selected Community agencies and programmes have been

opened for the ENP partners (European Commission 2006b). For instance, they could participate in the activities of the European Foundation for the Improvement of Living and Working Conditions and in those of the European Agency for Safety and Health at Work. However, to date, no ENP country has expressed an interest in doing so. In contrast, the new Community Programme for Employment and Social Solidarity (ibid.), which aims at supporting the implementation of EU objectives in the employment and social area, is not open to the ENP countries, but only to the EEA/EFTA countries and (potential) candidates (ibid.).

The implementation of the Action Plans is monitored through the relevant bodies and (sub)committees set up under the respective agreements. In addition, the Commission prepares progress reports with input from the country concerned, the High Representative for the CFSP, as well as international organizations. The monitoring process allows the EU to 'name and shame' foot-draggers, although this is not done explicitly. A glance at the progress reports issued so far confirms the EU's general preference for the first generation of human rights (civil and political rights) over the second generation (social and economic rights) (see also Chapters 2 and 13). In its overall assessment, for instance, the Commission acknowledges 'progress by several partners in the reform of electoral systems, in judicial reform and in public-sector governance', and mixed results 'as regards respect for fundamental rights, however, with less progress by certain partners in addressing issues such as restrictions on press freedom, intimidation of NGOs, political prisoners, ill-treatment in police custody, and extra-judicial killings' (European Commission 2006c: 2). Social rights, largely restricted to labour standards, are only mentioned in some individual progress reports. The Ukraine and Moldova have advanced most in this area, while in the Mediterranean countries, workers' rights, child labour and gender equality are improving only slowly. In spite of the lack of any overt 'shaming', the progress reports are also expected to create some peer pressure among the ENP countries in favour of further reforms. The same effect might have worked for Egypt as regards joining the ENP, leaving Algeria as the last reluctant laggard.

Extent of a social norm export in the ENP

Even though the ENP offers similar social goals to all participants, the PCAs with the European countries seem to be more far-reaching than those with the Mediterranean or Caucasian partners. According to the principle of differentiation, partner countries are assessed individually, and the extent of co-operation they are offered depends on their ambitions. The approach essentially relies on soft mechanisms based on incentives and persuasion. Without an institutionalized and legally binding system of 'policy export', the EU's leverage is limited, and its ability to export norms into its 'near abroad' encounters some serious constraints (cf. Gstöhl 2008b). First, a crucial precondition for a successful norm export is the political will of the ruling elites in the ENP countries to tackle the domestic reforms required to comply with the social goals. Another challenge is how

seriously the EU takes its own principles of conditionality and differentiation – that is, to what extent it will deliver real incentives and endorse its social values and norms by reacting to non-compliance. Problems of policy coherence may arise, for instance between the ENP's social development goals, on the one hand, and its free trade aspiration or security considerations, on the other. Social issues are not a priority for either side, compared with other objectives such as internal market rules or political stability. Third, the existence of an (unspoken) membership perspective makes a difference for the chances of success as both sides – the partner country and the EU – may make a greater effort.

According to Manners (2002: 244–45), EU norm diffusion takes place through contagion (unintentional diffusion), informational diffusion (strategic and declaratory communications), procedural diffusion (in an institutionalized relationship), transference (e.g. through trade and aid) or overt diffusion (through physical EU presence). The ENP relies in particular on procedural and transference diffusion, both of which are facilitated by the principle of conditionality, even though the other three mechanisms (contagion, informational and overt diffusion) also play a role. In this respect, it is possible to speak of at least an aspiration to become a 'normative power' (social) Europe: with the attempt to 'externalize' its social model, the EU acts as 'a changer of norms in the international system' (Manners 2002: 252). The ability to shape conceptions of 'normal' – also with regard to social matters – should indeed be greater in its neighbourhood than in the rest of the world, but competing normative, economic and political objectives are likely to impair a successful norm diffusion. Johansson-Nogués (2007: 182) therefore argues that 'the many contradictions inherent in the EU's foreign policy *vis-à-vis* the ENP area makes it difficult, for the time being, to fully concur with the assertion that the Union is a normative power'.

As a result, only bits and pieces of the 'European social model' are being exported to the eastern and southern neighbours. Hall (2006: 20) argues that 'the structure of the ENP clearly reflects the economic and political reality of the unequal bargaining power between the EU and neighbourhood countries, the continuation of liberalisation and privatisation as central economic policies, and the relative unimportance of the political and social dimensions'. The Euro-Mediterranean Free Trade Area, for instance, is expected to have social impacts 'that may be significantly adverse unless effective mitigating action is taken' in the form of market-correcting measures (SIA-EMFTA Consortium 2007: vii). In its 2005 declaration, the Euro-Mediterranean Summit of Economic and Social Councils and Similar Institutions (2005: 1) regretted 'once again that the Partnership's political authorities have failed to attach the necessary priority to the social dimension of the process'.

The Union's relations with its western neighbours, the EFTA countries, are much more institutionalized than those with the ENP. As highly industrialized market economies and longstanding democracies, they represent a very different category of third countries. Nevertheless, a brief comparison is of interest as the European Commission (2003: 15) referred to the EEA as a long-term model for the ENP, when the idea of a new neighbourhood policy was first launched.

The social dimension of EU–EFTA relations

Stopping short of EU membership at the time of its conclusion in 1992, the EEA covers the free movement of goods, services, capital and persons, competition rules as well as horizontal policies (e.g. environment, social policies, consumer protection, statistics and company law) and flanking policies (e.g. co-operation in research and development or education). Austria, Finland and Sweden joined the EU back in 1995, while Norway failed to do so as a result of a negative referendum. Switzerland's voters rejected the EEA Agreement in 1992, thus leaving only Iceland, Liechtenstein and Norway as EFTA partners in the EEA. With the accession of Bulgaria and Romania, the EEA reached thirty members in 2007.

The EEA Agreement aims at 'establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition', while 'noting the importance of the development of the social dimension, including equal treatment of men and women … and wishing to ensure economic and social progress and to promote conditions for full employment, an improved standard of living and improved working conditions within the European Economic Area' (preamble). The EEA therefore constitutes an expansion of the EU's internal market[18] to EFTA, 'based on proximity, long-standing common values and European identity' (preamble). The Final Act of the EEA Agreement contains a declaration by the EFTA governments on the EU's Social Charter in which they express their political will to promote progress in the social dimension of integration, in full co-operation with the social partners. For the application of the provisions on social policy, it is important to note that the EEA Agreement has not undergone changes in order to follow up later amendments such as in the Treaty of Amsterdam. Moreover, the Charter of Fundamental Rights proclaimed at the Nice Summit in 2000 does not apply in the EEA.

The horizontal provisions of the EEA Agreement contain a chapter on social policy (Articles 66–71), in which both sides agree upon the need to promote improved working conditions and a better standard of living for workers. These provisions must also be seen in relation to the goal of creating equal conditions of competition for economic operators and to the free movement of persons and freedom of establishment which may be affected by working conditions. They cover minimum requirements for health and safety at work, labour law, the equal treatment of men and women, including equal pay for equal work, and the promotion of a dialogue between management and labour at the European level. To a large extent, the Articles reproduce the wording of the corresponding provisions in the EC Treaty at the time. Annex XVIII to the EEA Agreement contains references to the secondary Community legislation that the EFTA states have to adopt in this field. Moreover, Protocol 31 lists acts that may serve as a basis for co-operation; for example, the EFTA states' participation in Community programmes and actions or in the European Foundation for the Improvement of Working and Living Conditions. The EFTA countries also participate in the European Agency for Safety and Health at Work, but not in the European Employment Strategy.

In order to preserve the homogeneity of the common economic area, new 'mirror' legislation is being added continuously, based on EEA decision-making procedures. The Commission retains the exclusive right to initiative, whereas the EFTA countries have the right to raise matters of concern at the EEA level at any time. EFTA experts are consulted by the Commission in the preparatory stage of new measures. The main discussions take place within the EEA Joint Committee in the so-called 'decision-shaping phase' once the Commission has transmitted its proposals to the EU Council and EFTA states (cf. Norberg *et al*. 1993: 129–48). The EEA Joint Committee decides by consensus as closely as possible in time to the adoption of the same rules by the EU Council in order to allow for simultaneous application. In addition, the EEA Council meets at ministerial level twice a year to give political impetus, and the EEA Joint Parliamentary Committee and the EEA Consultative Committee for the social partners act as advisory bodies. The EEA Consultative Committee comprises members of the EU Economic and Social Committee and of the EFTA Consultative Committee. Besides this channel of influence, the membership of the EFTA trade unions and industry confederations in Europe-wide associations allows them to take part in the social dialogue in the same way as their EU counterparts do. 'Thus, although the EEA governments may play a very limited role in the EU policy network, this is somewhat compensated for by the participation of the EEA's private business sector and civil society in EU-centred networks, organisations and programmes' (Emerson *et al.* 2002: 31).

In contrast to the ENP Action Plans, the EEA is based predominantly on legally binding acts. EFTA's main incentive is the good functioning of the internal market, offering them a level playing field. The perspective of joining the EU is not a 'carrot' motivating compliance, as EFTA states can apply for accession at any time but, for various reasons, have opted against EU membership (cf. Gstöhl 2002). In addition, persuasion takes place in the frequent formal and informal interactions between EU and EFTA representatives at different levels.

The 'sticks' are similar to those faced by EU members as infringement procedures (and preliminary rulings) are part of the EEA surveillance mechanisms. On the EFTA side, surveillance and enforcement are carried out by the EFTA Surveillance Authority and the EFTA Court of Justice. In order to secure a uniform interpretation of EEA rules, the EEA Joint Committee reviews the development of European Court of Justice (ECJ) case law and the EFTA Court (Norberg *et al.* 1993: 188–96, 213–72). Some aspects of social policy, such as labour law or the principle of equal treatment of men and women, have been extensively interpreted and developed by the ECJ and the EFTA Court. This case law must be taken into account when applying the EEA Agreement. Adoption of any EU legislation or other provision into the EEA requires agreement in the EEA Joint Committee. In case of an opt-out from new *acquis*, the EFTA countries, which need to speak with one voice, face the threat of a provisional suspension of related parts of the Agreement if all other solutions (e.g. transitional periods, equivalence of legislation, safeguard measures) fail. Unlike the PCAs and EMAAs, the EEA Agreement does not contain a human rights clause, although reference is made in the preamble to

the fact that the EEA would make a contribution to 'the construction of Europe based on peace, democracy and human rights'.[19] Hence, although the EEA is a child of the 1990s, there is no political conditionality in EU–EFTA relations.

As a result of its failure to ratify the EEA Agreement, Switzerland pursued a bilateral approach to integration, building mainly on its 1972 free trade agreement with the EU. In two 'package deals' in 1999 and 2004, it concluded sixteen sectoral agreements with the EU.[20] Most of these 'bilaterals I and II' are based on the notion of equivalence of laws between the two parties (cf. Felder 2001, 2006). The Commission consults with Swiss experts in the fields where Swiss legislation is recognized as equivalent, and Switzerland has observer status on a few EU committees. Typically, the joint committee set up by each bilateral agreement may make technical changes to the annexes of the agreement but may not add new obligations. However, there are three 'partial integration agreements' where Switzerland has agreed to accept the *acquis*: in the area of air transport (where the European Commission and the ECJ have competences in surveillance and arbitration in specified areas) and in the Schengen and Dublin association agreements, where new *acquis* requires approval from the Swiss legislature (but, in case of refusal, the agreement could be terminated). These associations foresee an adaptation to new *acquis* in the future, and Swiss representatives participate without a vote in the Commission's comitology and informal expert groups and also, with regard to Schengen, in the Council's relevant committees and working groups. Hence, Switzerland participates in EU 'decision-shaping' at least in these sectors. On the whole, the Swiss relationship with the EU comes close to the EEA in substance but not with regard to the institutional set-up.[21] The main aspect of EU social policy covered by the bilateral agreements is the co-ordination of national social security systems in the context of the free movement of persons.

For the EEA/EFTA countries, the degree of 'policy import' comes close to the social dimension of the enlargement process (see Chapter 3). To a large extent, they take over the norms of the EU's social model – if they do not already have the equivalent or even more far-reaching ones. In comparison with the ENP's soft instruments, the EEA relies on 'hard' legal mechanisms.[22] In the highly institutionalized EEA relationship, the spread of EU norms mainly takes place through procedural diffusion (Manners 2002: 244–45). In this sense, the normative power of 'social Europe' is stronger in the EEA than in the case of the ENP. However, given the already high social standards in EFTA countries, the impact has been limited.[23] The most important social consequences probably stem from the effects of the free movement of persons in labour markets in the EEA in the EU's bilateral relations with Switzerland.

Conclusion: squaring the circle?

This chapter has analysed the EU's goals, instruments and scope of 'exporting' its own social model to its 'near abroad'. The Union's objectives and tools differ considerably as regards the target countries: an extension of the internal market to EFTA versus an export of stability, security and prosperity to the ENP countries,

and an institutional system with legally binding procedures versus an approach of incentives and deliberation based on conditionality and differentiation. In a nutshell, the EFTA countries adopt EU norms because they have agreed and are legally bound to do so. In contrast, ENP countries align with EU norms either because they want the rewards that come with such a 'policy import' or because they begin to view these norms as appropriate and legitimate as a result of the EU's efforts of persuasion. In the EEA, the 'policy export' comes close to the social dimension of enlargement; in the ENP, it is much more limited, with some nuances between its eastern and the Mediterranean partners.

Given the differences between the two groups of countries, these findings are not surprising. The EFTA states are highly developed democratic welfare states with a positive human rights record – in particular, the Nordic countries take pride in high labour standards. The EEA's social dimension and its dynamic nature pose no problems for them. EFTA states receive no financial assistance from the EU but have created their own funds to help reduce social and economic disparities in the Union (EEA Financial Mechanism, Norwegian Financial Mechanism, Swiss cohesion contribution). Moreover, they have a clear membership perspective, while the Mediterranean partners enjoy no such option and, at the most, the eastern ENP countries experience an ambiguous one.[24]

Overall, the social dimension of the EU's neighbourhood policies remains relatively weak. Given the Community's issue-specific competences, it is not surprising that an export of market-creating norms, such as those related to trade liberalization, is more prevalent than market-correcting norms, such as social policies that have remained shared or national competences (cf. Chapter 2). In contrast to the ENP countries, there was no real need for social reforms in the EFTA welfare states, but it is the EEA, not the ENP, that features 'hard' mechanisms of policy export. The Union's ability to shape which social model passes as 'normal' is hampered by the absence of a clearly defined EU social model and by domestic constraints in the neighbouring countries: on one side of the spectrum, the high level of social standards in EFTA countries, while on the other side, the lack of political will to carry out reforms in ENP countries, the challenge of conflicting EU priorities and the open question of a membership perspective for European ENP countries.

Even though the European Commission (2005: 2) contends that the EU's 'external policies have always had an important social dimension', Deacon (1999: 74) finds a 'relatively low influence' of the EU's internal social policy on its external relations. In terms of trade, 'the external forces shaped internal social policy rather than the other way round', social rights have not been moved further up the agenda of the human rights aspect of the CFSP, and 'there is no sign of the internal social policy impacting on development policy', except for the EU's enlargement policy (Deacon 1999: 74). Still, even for the eastern accession rounds, Keune (2006: 185; see also Chapter 3) finds that 'enlargement was more about economic than about social integration and convergence'.[25] In view of the 'academic consensus' on the weak social dimension of the enlargement process (Lendvai 2004: 322), it should come as no surprise that the 'export' of the European social model to the other neighbours is also rather weak. Social objectives have not been a

priority for the Union in either the ENP or the EEA, compared with other economic or political goals.

The EU itself has often been criticized for systematically prioritizing different aspects of economic policy over social objectives (Daly 2006: 468, 475). The Lisbon Agenda, which helps in translating the European social model into practice, is also riddled with tensions: 'Intellectually, Lisbon asks us to see competitiveness and "social Europe" as consistent, and to close our eyes to the fact that the reform programme instituted in its name is, at least in part anyway, contributing to the social ills that it claims to be addressing' (Daly 2006: 477–78). Recently, the Union explicitly added an external dimension to its Lisbon Strategy, claiming that Europe should take the lead and 'envisage globalisation not only as a challenge but also as an opportunity to be shaped and a responsibility to be taken' (European Council 2007). This responsibility includes the fact that the EU 'exercises its external policies in a way which contributes to maximising the benefits of globalisation for all social groups in all its partner countries and regions' (European Commission 2005: 2). It does not necessarily imply an attempt at 'squaring the circle', but combining economic and social progress through a 'policy export' poses considerable challenges to the Union, given its diverse objectives in the neighbourhood.

Notes

1 See http://www.ec.europa.eu/employment_social/international_cooperation/index_en.htm (accessed 1 August 2007).
2 On the social dimension of the enlargement process, see Chapter 3 by Maarten Keune. Moreover, the Stabilization and Association Process may be considered a 'pre-pre-accession strategy' as, in 2000, the European Council officially recognized the western Balkan countries' vocation as 'potential candidates' for EU membership (cf. Pippan 2004).
3 All the bilateral agreements concluded in the 1990s contain provisions on social co-operation and – except for the interim agreement with the Palestinian Authority – on social dialogue. Some of them (Algeria, Morocco, Tunisia and the eastern countries) feature specific articles on the equal treatment of workers or even the co-ordination of social security regimes.
4 It is equally paradoxical that the inclusion of human rights clauses in agreements with third countries preceded the introduction of a suspension clause in the Amsterdam Treaty. Under this clause, certain rights of EU member states (e.g. voting rights in the Council) may be suspended if they seriously and persistently breach the principles on which the Union is founded.
5 Russia indicated early on that it was not interested in being considered as part of this initiative and preferred to develop its own Strategic Partnership with the EU.
6 The other fields are development of human resources, involvement of municipalities and regions, and exchanges between civil society, health, migration and illegal immigration. With regard to social development, it had been stipulated that the EMP 'must contribute to improving the living and working conditions and increasing the employment level of the population in the Mediterranean partner States, in particular of women and the neediest strata of the population' and that particular importance was attached 'to the respect and promotion of basic social rights' (Euro-Mediterranean Conference 1995).
7 The PCAs with the South Caucasian countries – such as those with the Central Asian states that are not part of the ENP – embrace no such free trade perspective.

8 Algeria's Action Plan has not been adopted yet.
9 Israel's Action Plan talks more vaguely about the opportunity for increased legislative co-operation with an aim to explore the possibility of approximation of laws in appropriate areas.
10 Byrne (2004) argues that this bias towards civil and political rights also applies to EU aid programmes, such as the specific EMP programme MEDA (1995–2006) and the more general European Initiative for Democracy and Human Rights (1994–2006).
11 In the EU–Ukraine Agreement, the reference to the UN Charter is missing.
12 Moreover, the EU is considering granting further autonomous trade preferences to Moldova. Since 2000, such concessions have already been offered to the western Balkan countries, allowing for nearly all their exports to enter the Union free of duties and any quantitative restrictions.
13 The EU's development policy in general endeavours to promote labour standards through financial and technical assistance, co-operation with the ILO, thematic planning, country and regional programming or obligations to respect core labour standards in tenders for Community-funded contracts (see Chapters 2 and 12).
14 Regulation No. 1638/2006 of 24 October 2004, OJ L 310.
15 The relative scope of the EU's financial commitment to the ENP's social dimension is difficult to identify. The categories used in the Indicative Programmes differ greatly and do not always specify amounts. The ENPI Annual Action Programmes for each country still have to be adopted, and support will be tailor-made with individual priorities not necessarily being dealt with during the same year. Furthermore, ENPI assistance will increasingly move towards (conditional) budget support for partner countries (i.e. larger transfers of funds to implement comprehensive sector programmes instead of specific single projects). The EU also co-ordinates with other donors and leaves certain social issues to actors considered more appropriate, such as the World Bank.
16 Given the prevailing political situation in the West Bank and Gaza Strip, the Palestinian Action Plan is generally much shorter than the others.
17 The Action Plans of Armenia and Georgia also refer to the revised European Social Charter.
18 The Common Fisheries Policy, the Common Agricultural Policy, the Common Commercial Policy, Economic and Monetary Union as well as foreign, security and defence policy or co-operation in Justice and Home Affairs are not part of the EEA Agreement.
19 There are also no human rights clauses in the EU's many bilateral agreements with Switzerland.
20 They comprise the free movement of persons, technical barriers to trade, public procurement, civil aviation, overland transport, agriculture, research, Schengen/Dublin association, taxation of savings, fight against fraud, processed agricultural products, environment, statistics, media, education and pensions.
21 On the one hand, Switzerland has a less institutionalized 'voice' in Europe than the other EFTA countries. On the other hand, except for the associations, the bilaterals are rather static and require new negotiations to adapt to relevant future *acquis*.
22 Arguably, the EEA also employs incentives for the adoption of the *acquis* (benefits of the internal market versus the threat of an infringement procedure or a partial suspension of the Agreement) as well as tools of persuasion (decision-shaping, social dialogue, participation in programmes and actions, etc.).
23 However, Switzerland, for example, would have been obliged to introduce parental leave in case of EEA membership.
24 Ironically, the EU has to some extent launched both the EEA and the ENP in order to stave off new membership bids at times when it had to give priority to its deepening efforts. The unsatisfactory outcome of the EEA negotiations motivated some 'reluctant' EFTA countries to apply for EU membership. In case of the ENP, the policy's

very success may increase the pressure for enlargement as it helps prepare European participants for membership.

25 The same seems to hold true for the current enlargement negotiations: see Stubbs and Zrinščak (2005).

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5 EU–ILO relations

Between regional and global governance

Ailish Johnson[1]

European Union (EU) citizens are increasingly confronted by the global context in which their choices, and those of their governments, are made. The use of child labour in the production of carpets and footballs is a good example. The existence of countries in which child labour was acceptable and where families had few alternatives, combined with manufacturers' desire to keep wages low, has created an undesirable situation of child workers that trade policy alone has been unable to confront and correct. As a result, national, regional and global development policies have also been directed towards examining the reasons why child labour exists and persists, and proposing alternatives. Alongside aid, education and economic development policies, which are critical to the multidimensional solutions that are necessary to end child labour, the normative and legal justification for the condemnation of child labour has come largely from the core labour standards (CLS) of the International Labour Organization (ILO). In order to emphasize the importance of the ILO CLS and provide more weight to its own support for fundamental worker rights, the EU has integrated the ILO core standards into some of its key bilateral agreements (see also Chapter 9 on trade relations).

As this very brief synopsis illustrates, in a world of global markets, norms and standards generated by global institutions have taken on a new and necessary importance as a means of influencing the conduct of nations. It has also made the interaction of regional and global governance in the social policy field highly relevant for both policy practitioners and citizens. Several questions arise from this context: how does the EU operate at the ILO to advance its social policy agenda, and is this helpful for promoting global standards for social policy? In what areas does the ILO have the competency to legislate, and what occurs when ILO and EU competence overlap, or when the obligations of two international organizations, such as the ILO and the World Trade Organization (WTO), come into conflict?

This chapter aims to assess these questions by examining the formal and informal relationship between EU and ILO governance of social policy over time, as guided by an historical institutionalist methodology employing careful process tracking (Pierson 2004). To illustrate the evolution of the EU–ILO relationship, this chapter first provides an overview of the formal co-operation between the European Commission, as the representative of the EU in international fora, and

the ILO. It then considers the informal channels involved in this relationship, such as the co-ordination of EU member states at the ILO via the EU Presidency, and the Industrial Market Economy group (IMEC) in Geneva. It then reviews several recent case studies in which EU and ILO governance has overlapped: the development of CLS, the World Commission on the Social Dimension of Globalization and the decent work agenda. In the conclusion, the broader questions posed in the first chapter of this book will be addressed, including whether European and global forms of social policy are coherent and mutually supportive, or if they may work against the effective operation of one another; the relative importance of hard and soft law approaches; and the consistency of the EU's pursuit of social goals with other goals, such as open markets. An assessment of the relevance to the EU of global governance in social policy, as embodied by the ILO and its policy outputs, will also be offered.

Formal inter-institutional co-operation between the EU and ILO

In 1953, the European Coal and Steel Community (ECSC) and the ILO concluded their first co-operation agreement. It allowed for mutual consultation, the exchange of information and statistics, and for the ILO to be both consulted and contracted for technical assistance by the ECSC, in particular in matters relating to working conditions and the training of workers in the coal and steel sector. When national governments began considering an expansion of the ECSC's institutions and working methods to the broader economy, the ILO was called upon once again to provide expert advice to governments on the social competences to be given to the European Economic Community (EEC) (ILO 1956).

The 1956 Ohlin Report concluded that there was no need to 'harmonize' social policies (ILO 1956: 40–41), although in his one dissenting view, Mr Byé of France warned that, in practice, the least ambitious social legislation would tend to be taken as the standard in the newly formed EEC (ILO 1956: 129).[2] The persistent themes of the debate about social aspects of economic integration are presented in the Ohlin Report: the fear that 'competition from countries with lower labour standards and lower labour costs may be "unfair"', that the social costs of integration may be spread unequally in society, and that countries with 'more advanced labour standards' may find it difficult to raise wages or social benefits in light of international competition (ILO 1956: 3–4).

The Ohlin Report ultimately recommended the inclusion of provisions to ensure co-operation among the member states in several key areas: the free movement of labour, social security and equal pay for women. These were included in the Treaty of Rome in Article 48 (now Article 39), Article 118 (now Article 137) and Article 119 (now Article 141) respectively (in the new Treaty of Lisbon, the social policy section is found in Title X, Articles 136(a)–143). The Report also suggested the common ratification of ILO Conventions by the six EEC member states – on hours of work and required holidays, freedom of association, pay equity, common employment statistics and minimum standards for social security – in order to

solve 'certain of the social problems connected with closer European economic co-operation' (ILO 1956: 116). In the end, this suggestion was not followed up and, instead, an independent European Commission was created to promote co-operation among the six member states, including co-operation in employment and social policies (Sous-commission des Problèmes Sociaux 1955). So, from the beginning of the EEC, using ILO Conventions to create common standards among the member states was rejected in favour of an independent regional system.

Despite the independence of the EEC in social policy matters, formal co-operation continued to expand. In 1958, the European Commission and the ILO signed an accord that allowed for ILO representatives to be invited to EEC meetings, and for a greater exchange of information and technical assistance (EEC 1958). Notably, however, no specific agreement was made on the EEC's possible observer status at the ILO in the final Agreement, as had been made for the High Authority of the ECSC at certain ILO committee meetings (ECSC 1953).[3] This situation was not formally rectified until an exchange of letters in 1989, although the Commission continues to act only as an observer and not as the co-ordinating entity for member states (as it does at the WTO).

In 1961, a permanent contact committee was created between the ILO and the EU (ILO 1961), and yearly meetings between the European Commissioner for Social Affairs and the ILO Director General became common practice. Such high-level meetings continue to be an important means of communicating information from the EU to the ILO as, in the words of an ILO official in an interview in 2002, 'many contacts between the ILO and EU officials are based on personal contact and not a systemic relationship'.

In the mid-1970s, however, the inter-institutional balance between the two institutions shifted almost completely. Pre-1970, ILO Conventions had played an important role in suggesting key areas for social co-operation in the newly formed Community and in providing advice on health and safety standards and labour mobility. However, this balance slowly began to shift. The ILO continued to provide advice to the Community on technical matters, notably the harmonization of the social security regimes of the new member states in the case of migrant workers and advice on establishing health and safety standards, but the idea that the ILO could serve as 'an adviser and mediator in the process of mutual accommodation inside a widening community' retreated as the politics among the then nine member states sidelined global-level intervention in their highly complicated internal bargains (ILO 1971: 8).

When the first enlargement of the EEC was negotiated in 1973, a note to the Director General of the ILO stated: 'the Communities have both the expertise and resources, and the direct means of action to promote and implement a dynamic social policy, which far exceed those of the ILO' (ILO 1971: 4). ILO officials thus recognized that the EEC Treaty, combined with the intellectual resources available to the Commission and the legal capacity of the European Court of Justice (ECJ), had surpassed the ILO's policy capabilities. Examples of the interaction between EEC and ILO legislation support the observation of the growing dominance of EEC over ILO legislation, including the fact that member states began

acting jointly to try to adapt proposed ILO Conventions to Community standards (ILO Convention No. 67, later No. 153), or would not ratify ILO Conventions seen as incompatible with Community law (ILO Conventions No. 89 on Night Work (Women) and No. 170 on Safety in the Use of Chemicals).

Alongside the growing policy dominance of EEC law in member states, the Commission attempted to assert its authority to co-ordinate the Community position by identifying ILO Conventions that should be ratified by all member states in areas of exclusive competency. The Commission also suggested that the ECJ could enforce the provisions of these ILO Conventions should a member state fail to implement them (as detailed in Betten 1993a). The Commission argued that ratifying ILO Conventions in common via an ECJ-enforceable Directive would create coherence among the member states with regard to their international obligations in the social policy field. In addition, it 'would prevent member states from evading or denouncing their provisions by retreating behind their own constitutional systems' (Rhodes 1991: 16). However, this proposal was rejected by member states after lengthy debates in Brussels and a rather nebulous ruling by the ECJ.[4]

As a result of the ECJ opinion, and given member state unwillingness to create a single EU position on the development of ILO Conventions, even in areas where there is joint competence with the Union, the Commission has been unable to assume more formal leadership of the EU at the ILO. In the words of one Commission official: 'states are jealous of their international role and they don't want to share it with us [the European Commission]' (Johnson 2005: 161). In other words, despite the enhancement of the EU's remit in social policy in successive Treaty revisions, member states resist transplanting formal regional co-operation in social policy to the global level.[5]

Interestingly, member states are not the only actors in the EU system to have expressed an unwillingness to see greater formal co-ordination at the ILO. For very diverse reasons, trade unions and employer groups have also expressed opposition to the co-ordination of the EU position by the Commission largely because of the threat that EU co-ordination would pose to national bargaining systems, and the possibility of majority-rules voting by member states on the position to be taken in the ILO (a possibility the UK's employer group, the Confederation of British Industry, strongly opposes).

In parallel with the difficulties of formal EU representation at the ILO, challenges have persisted in inter-institutional co-operation between the ILO and the EU. An ILO review of technical co-operation in 1988 noted three main problems hindering co-operation: the 'strong preference' of the Commission for executing agencies based in the EU (whereas the ILO, based in Switzerland, is outside the Union), the complexity of EU rules and procedures that often conflict with those of the ILO and the decentralization and fragmentation of decision-making in the EU between different Directorates General (DGs) which the ILO found hard to cope with (ILO 1988). This review led to an initiative to revitalize the ILO–EU relationship by enhancing the activities of the permanent contact committee and formal recognition of the EU's observer status, as represented by the Commission (European Commission 1990).

An exchange of letters in 2001 produced the same emphasis on the importance of ILO–EU co-operation (European Commission 2001b; see Chapter 1), yet recognized that, in the fields of employment, social protection and social dialogue, the EU had advanced to a more profound level of integration than the ILO, facilitated by a more cohesive and much smaller membership and by a more robust (although not necessarily less complex) set of institutions. Specific initiatives of ILO–EU co-operation were highlighted for further development, including an exchange of information and experience on the European Employment Strategy (EES) with the ILO Employment and Development Office, 'targeted collaboration' on social protection issues and 'the possible dissemination of the lessons from the European experience with social dialogue to other regions of the world' (European Commission 2001b). Still, the ILO maintains its leadership in the promotion of labour standards, an area in which, given its global membership, it is well placed to exercise leadership. The 2001 exchange of letters noted a 'strong common interest' in promoting 'labour standards and human rights … alongside economic development and trade liberalization' via the ILO's 1998 Charter on Fundamental Principles and Rights at Work and the EU Charter of Fundamental Rights (European Commission 2001b). Since 2001, this co-operation has 'intensified' and broadened to encompass close interaction on the EU's Lisbon Strategy and the ILO's decent work initiative (Delarue 2006).

Despite renewed avenues for formal co-operation between the EU and the ILO, and given the opacity of the ECJ's ruling in 1993 and the 'unsavoury' option of further 'litigation over their [Commission versus Council] competence in matters relating to the ILO', only negotiations between all parties concerned will create effective solutions to the challenges of EU representation at the ILO (EESC 1995). In practice, this is exactly what is happening on an informal and case-by-case basis in Geneva, with co-ordination of the member states being led by the EU Presidency.

Informal co-ordination at the ILO: the Presidency, regional groups and IMEC

The ILO Constitution does not prevent several member states from expressing their views through a regional representative, but no formal agreement on EU representation of member states at the ILO has been forthcoming (Frid 1995: 295). The reluctance of member states to cede formal competence to the Commission contrasts with day-to-day practices at the ILO. In fact, the member states co-ordinate via three mechanisms: the EU Presidency, formal regional groups and the Industrial Market Economy Countries group (IMEC). New ILO legislation is also discussed in Brussels via the co-ordinating unit in DG Employment and Social Affairs. In comparison with instructions from Brussels via the 133 Committee on trade matters (see Chapter 9), however, co-ordination on social policy in Brussels is very low. As a result, there is little contact between the ILO and the European Parliament. Thus, most EU member state co-ordination at the ILO occurs in Geneva.

The country holding the EU Presidency has a co-ordinating role and may read the position of the EU to the ILO meetings. EU Presidency co-ordination is also necessary because at times the right of the Commission observer to speak for the EU has been questioned by social partners from the member states, including those of the UK and France (Frid 1995: 299–300). The Presidency chairs meetings of member states held in Geneva. These are considered to be Council or intergovernmental meetings. Such regular meetings are held either just before or just after IMEC meetings (see below).

The Presidency can also take the initiative to put issues on the agenda for discussion by the member states. At a technical level, for example, the proposed ILO Maternity Convention (No. 183 of 2000) was discussed at great length in internal Commission meetings and among member states in order to create proposals for the Convention. Effective EU technical co-operation may have backfired with regard to the ILO's goals, however, for the resulting legislation was too detailed for the majority of ILO member states to ratify.[6] A similar outcome occurred when EU member states tried to co-ordinate on the proposed ILO Convention on Part-time Work (No. 174 of 1994). Co-ordination, in the words of one ILO official, got 'bogged down in the Social Affairs Committee' over disagreements as to whether an ILO Convention could be enforced effectively. In the end, eight member states ratified the Convention.[7] Still, the EU-level social partners used the ILO Convention as a key reference document during Social Dialogue negotiations, as did the European Parliament (1997).

Presidency co-ordination of a common EU position is most effective on high-level political questions, such as the treatment of trade unions in Colombia, sanctions against Myanmar (Burma) and support for the implementation of CLS, especially on child labour. Still, there is nothing to hold member states to this common position. In practice, the member state holding the EU Presidency presents a common view on behalf of all Union governments, but voting by member states is 'not always coherent' with that view (ILO 1993: 2), and government representatives from EU member states may stand to support the Union's position but may also add their own comments and priorities.

The prospects of Presidency leadership somehow being reversed to make way for sole Commission leadership at the ILO are thus gloomy, as member states still enjoy being able to make their own independent interventions at the International Labour Conference. Much depends on the leadership of the member state holding the Presidency: if the member state is activist, such as the Belgium Presidency of 2001 (Johnson 2005: 164), there can be some movement towards co-operation. However, as the Presidency rotates, and as member states remain free to state their own views in addition to the EU position, to date, this has had little effect on the daily practice of relations between member states and the ILO.

Formal regional groups also exist in the ILO (Asia and Pacific, Europe, Africa, and the Americas), under Article 38 of the ILO Constitution, once again having tripartite representation. Regional groups may make resolutions or submit reports to the Governing Body. In the European Regional Group, the Commission sends a delegation, is recognized to speak in its own right and promotes the EU agenda

concerning labour market reform (ILO 2000; cf. Chapter 8 concerning the role of the EU in the World Health Organization).

The IMEC cross-cuts these regional groups. Given its diverse and economically powerful membership, the IMEC position is usually the most influential of the groups permitted in the ILO. IMEC was formed at the ILO in the late 1970s in reaction to the threatened departure of the US from the ILO.[8] IMEC currently has thirty-five members, including the EU member states, the US, Canada, Australia, Japan and New Zealand. The group meets to take a common position in various ILO committees, on policy areas and organizational issues, including at the ILO's Governing Body and the annual International Labour Conference. The European Commission has suggested that it should be permitted to join the IMEC. However, this has been rejected by some EU member states and other IMEC members.

The chair of the IMEC group makes interventions and common statements in the Governing Body on political issues and on technical issues to committees. It is in the ILO Governing Body, on which Germany, France, the UK and Italy are permanent members, that IMEC proves to be more effective than the Union, because otherwise there would be no EU co-ordination on finance or budgetary issues. There is also no Union co-ordination in the Geneva Group, which brings the largest fourteen donor states to the UN to discuss budget priorities for the UN institutions, including the ILO. EU co-ordination, while arguably strongest in areas where the ILO promotes fundamental norms, such as CLS, is weakest on financial and budgetary questions where the fiscal capacity of states, and the EU's shortcomings, are clear. In addition, it is obvious that some member states, such as the UK, would, in the words of one UK official, 'rather work with US and Japan rather than as a [European] bloc' on certain issues (Johnson 2005: 165).

Ultimately, informal co-operation and co-ordination among EU member states depends on the issue – there is significant variation in the level of co-operation between Union member states depending on the subject involved. On political questions, EU member states are quite well organized with a common position, while on technical interventions, the picture is more mixed and reflects national priorities and preferences for social policy organization. This is reflected in the high variation in ILO Convention ratifications among member states (Johnson 2005). Finally, on financial questions, there is little EU co-ordination, reflecting the systemic weakness of the Union as the result of its small budget, which can only support global ventures, such as the promotion of the ILO Declaration on Fundamental Rights, in a very limited way.

New modalities in EU–ILO relations

In order to suggest where EU–ILO relations may be heading in the future, three examples of recent effective co-operation between the two institutions provide insights into the mechanisms for co-operation and the results that such co-operation can produce. The first concerns the origins of the campaign to promote CLS, the second is the ILO World Commission on the Social Dimension of Globalization, and the third is the decent work agenda.

Core labour standards

The ILO Constitution does not identify any specific human rights or labour standards of special or primary importance. In the 1970s, the European Commission pushed the ILO to identify certain Conventions as 'fundamental norms' as part of its own efforts to link ILO Conventions to trade preferences for less developed countries (European Commission 1978; ILO 1984).

It was not until the 1980s, however, that a debate began both inside the ILO and among its members about the possible benefits of highlighting specific conventions as fundamental norms or human rights (Betten 1993b: 66). The external impetus to identify certain conventions as 'core labour standards' gained momentum at the 1995 World Summit for Social Development in Copenhagen, which identified specific Conventions as basic worker rights (see Chapter 1). The 1995 Copenhagen Summit, the 1996 Organization for European Co-operation and Development (OECD) study on International Trade and Core Labour Standards (OECD 1996) and the 1996 Singapore WTO Ministerial Declaration acknowledged the existence of 'internationally recognised core labour standards' and identified the ILO as 'the competent body to set and deal with these standards' (WTO 1996; cf. Chapter 9). These statements reinforced the ILO's work on a Declaration outlining the CLS.

The 1998 ILO Declaration on Fundamental Principles and Rights at Work identified four CLS covered by eight ILO Conventions (see Table 1.1 in Chapter 1). All EU member states (including the latest members, Bulgaria and Romania) have ratified the conventions that cover the CLS. Although the EU cannot ratify these core conventions, it has included aspects of them in the EU Charter of Fundamental Rights (2000) and the 2004 EU Constitution (which failed to be ratified by member states) and in the 2007 Lisbon Treaty. In addition, at the EU level, ILO CLS have also been referred to in the Generalized System of Preferences (GSP; see Chapter 9). The EU's use of ILO CLS in its GSP regime did not go uncontested, however, as several developing countries, most notably India, launched disputes at the WTO. The WTO Appellate Body ultimately ruled that, among other issues, criteria permitting differentiation in GSP schemes is permissible pursuant to WTO rules under certain conditions, including that treatment was for a development, financial and trade need, and that the criteria for such treatment met an 'objective standard' (WTO 2004).

As a result of this ruling, the EU adapted its GSP regime for 2005–8, introducing what Commissioner Mandelson calls a 'GSP-plus' regime, which provides preferential market access to developing countries that have 'ratified and implemented key international conventions' related to 'core political, human and labour rights', including those conventions associated with the ILO's CLS (see Chapter 9). While certainly beneficial from the perspective of promoting the ILO's CLS, the new regime is not without critics, who argue that the EU's criteria do not meet the tests set by the WTO Appellate Body. Specifically, the criteria that a country be responsible for no more than 1 per cent of EU imports under the GSP regime has no correlation with development goals, but rather concerns the composition of Union trade and the fact that applicants must have applied by a set date,

thus producing a 'closed list' of beneficiaries that does not respond to changing circumstances in developing countries (Bartels 2007). ILO standards have also been integrated into the 2000 Cotonou Agreement (see Chapter 9), and into EU regulations on procurement which require those awarded contracts to 'respect internationally agreed core labour standards'.[9] The Union has also called, more broadly, for an enhanced place for ILO CLS in the work of the WTO, although, to date, the WTO has provided only a limited mention of the ILO's work in this regard (such as in the 2001 Doha Declaration), and in no way requires member states to ratify ILO conventions as part of their WTO obligations.

The EU thus both encouraged the ILO to develop a set of CLS and, along with member states, contributed to the ILO's budget to promote these standards. While highly successful for the ILO, the core labour rights campaign has also assisted the Union – when it negotiates agreements with other countries and regions, it is able to point to the implementation of the ILO CLS as part of the 'social pact' or minimum social standards contained in the agreements. The ILO's endorsement of the CLS, and the EU's willingness to both adopt and promote them, lend legitimacy to the EU's calls for social aspects of integration to be considered in its foreign policy. It should be noted, however, that the promotion of social and labour standards still appears alongside the EU's desire to manage its markets in ways that avoid import surges in specific sectors in which developing countries are highly competitive, preserves traditional trading patterns in specific products (such as bananas) and, ultimately, limits market openness (European Commission 2007).

The ILO World Commission on the Social Dimension of Globalization

Partly in response to the failure to include a reference to labour provisions in the WTO, and encouraged by renewed EU, US and public interest, the ILO launched the World Commission on the Social Dimension of Globalization (WCSDG) in February 2002; its report was released in 2004 (WCSDG 2004; see Chapter 1). Several Europeans served on the WCSDG, including one of the two co-chairs, Ms Tarja Halonen, the then President of Finland.[10]

In the WCSDG report, the EU was widely praised for presenting a model of regional development that emphasized social values and a 'social model' valuing dialogue among the social partners and social cohesion. The report highlighted that, if properly constructed, regional integration could 'promote a more equitable pattern of globalization' in several ways. These included by empowering groups traditionally disadvantaged in society, preventing a race to the bottom, building capacity for social programmes such as worker retraining through legal and institutional mechanisms, and helping member states withstand external shocks and better adapt to the challenges of a global economy (WCSDG 2004). The practice of resource transfers in the EU – such as via the Structural and Cohesion Funds – was singled out as particularly praiseworthy.

Surprisingly, as it ignored the ILO's longstanding relationship with the Union, which had directly influenced the original areas of EU co-operation in the labour

market and social policy fields, the WCSDG took a linear, building-block approach to describing the relationship between regional and global governance, suggesting that, in cases where 'social goals are built into regional integration and regional institutions, this provides a starting point for building them into the wide global economy' (WCSDG 2004). Rather than describing the real, if messy, interaction between regional and global governance, the WCSDG preferred a vision of regional integration projects as a 'stepping stone towards fairer globalization' – perhaps taking the prudent view that sharing with one's neighbour should be easier than sharing with a more distant stranger, if not more obviously in one's best interest, on the way to demanding a more even distribution of the benefits that open markets have provided (WCSDG 2004).

The EU, for its part, has been a champion of the WCSDG's work. First of all, the WCSDG lent support, and global credibility, to the EU's own social policy agenda including the Lisbon Strategy. As the Commission proudly noted, the WCSDG indicated 'growing interest … in the EU approach to economic, employment and social issues and, more generally in the EC model of sustainable development' (European Commission 2004). The Commission was also pleased with the WCSDG, as it serves as an effective advocacy tool arguing for greater coherence among the EU institutions and member states in aid and development policies so as to contribute to 'maximising the benefits of globalisation for all social groups in all its [the EU's] partner countries and regions' (European Commission 2004: 2). In its reaction to the report, the Commission noted that the EU 'should aim to speak more consistently with one voice' at the global level on economic and social issues (European Commission 2004).

The Commission has also supported the broader 'global governance architecture' questions raised by the ILO report, suggesting greater coherence in the objectives and working instructions of the international financial institutions (IFIs), better alignment between the WTO and the ILO, and that consideration should be given to the creation of an Economic and Social Security Council at the UN (European Commission 2004).

Most interesting, perhaps, was the reaction to the report by the European Economic and Social Committee (EESC), comprising EU social partners, which underlined the similar values expressed in the report and the Union's own vision of a 'social market economy' (EESC 2004). The EESC also noted the importance of implementing the Lisbon Strategy (which provides overarching guidance to the EU member states on employment and social policy goals), as well as the 'leading role' the Union should play in promoting multilateralism and global governance, including the ILO CLS and decent work agenda (EESC 2004).

The WCSDG, and the EU's reaction to it, thus demonstrate clear synergies between regional and global governance and, in particular, the common values shared by the Union and the ILO. Not only do the basic principles espoused by the WCSDG have great similarity with the goals of the EU's Lisbon Strategy, the detailed implementing agenda proposed by the World Commission clearly has much in common with the EU's policy approach, as will be shown in the next section.

The decent work agenda

The decent work agenda has been the overarching umbrella under which the ILO's CLS and the work of the WCSDG has developed. It has also been a parallel process that is now coming fully into its own. The formal decent work agenda began in 1999, with the overall goal of 'securing decent work for men and women everywhere' while using this issue to refocus ILO work and help in the process of modernizing the ILO as an institution (ILO 1999). Securing decent work for all, 'in conditions of freedom, equity, security and human dignity', is articulated today as the ILO's 'primary goal' by Director General Juan Somavia. Once again, the Commission sees great synergies between the ILO's decent work agenda – based on promoting rights at work, social protection, the social dialogue and gender equality – and the EU's approach to employment policies that combine 'economic competitiveness and social justice' (European Commission 2006a).

More specifically, the Global Employment Agenda (GEA) was launched by the ILO at the Employment Forum in Geneva in November 2001, and adopted by the ILO's Governing Body in March 2002. The GEA called for global institutions, including the World Bank, International Monetary Fund (IMF) and UN agencies, to recognize the importance of employment strategies in reducing poverty, preventing discrimination and social inclusion, and promoting skill development and adaptability. The ILO recognized the inspiration the EU had given to the project, as there 'are a lot of common features between' the GEA, the EES and the OECD Jobs Strategy (ILO 2002: para. 1.1). Most notably, there are significant similarities between the implementation of the GEA and the activities under the EU's open method of co-ordination (OMC), including the sharing of best practices and the promotion of case studies on core themes or elements.

In addition, the EU's National Action Plans (NAPs) under the EES – guided by the open method of co-ordination involving common benchmarks, national reporting and Commission supervision and feedback – have inspired the thinking of ILO officials, who have suggested such reporting in the GEA to supplement the Country Employment Policy Reviews and the World Employment Report already produced biannually by the ILO's Employment Strategy Department. The GEA also had an overlap as regards one key personality – Allan Larsson, former Swedish Minister of Finance, former Director General at the Social Affairs Directorate in Brussels and a lead figure in the development of the GEA. One official speculated: 'Mr. Larsson may be trying to do for the ILO what he did for Europe'.

Notably, however, the EU member states did not co-ordinate their position on the GEA, viewing it as being aimed at developing countries and fulfilling the UN Millennium Goals on poverty reduction. In the view of EU member states, while the ILO may use the EES as inspiration for the GEA, they are separate matters. Still, other aspects of the decent work agenda provide impetus for EU co-operation, such as the ILO Maritime Labour Convention of 2006, which the European Commission, Council and European Parliament have all recommended be ratified by all member states (European Commission 2006b; see Chapter 7). In specific areas, ILO conventions still have an important role to play in setting a common standard.

The present state of employment policy at the global level demonstrates that the EU has surpassed the ILO in producing concrete initiatives, which is hardly surprising considering the EU's much superior fiscal capacity which allows it to act in areas such as worker retraining and redistributive projects such as a Globalization Fund to aid workers facing job loss (European Commission 2006c). Perhaps ironically in the face of a high degree of mutual exchange, common benchmarking and redistribution at the regional level, EU member states continue to resist co-ordinating their position on employment issues at the global level. While regional policies may inspire global ones, limited or mixed EU competency in the employment field means that member states will continue to assert their authority and distinct interests (Johnson 2005).

Conclusion

This analysis of the evolution of the ILO–EU relationship shows that, in the period from 1950 to 1970, the EU used ILO Conventions as a key source of policy advice on issues such as health and safety, labour mobility and vocational training. However, the EU gradually became increasingly independent of the ILO during the 1970s–1990s, as the former set its own standards and policy direction. Over time, regional governance in the EU, as assessed by the yardstick of enforceable hard law, has become far more robust than global governance in social policy, although it could be argued that this is to be expected given that the ILO has always relied on its member states to enforce its conventions rather than having its own independent enforcement capacity.

Evolving from a 'policy emulator' of the ILO in the 1950s to a more equal partner, during the 1990–2005 period, the EU became a kind of 'policy incubator' for the ILO, serving to 'pre-cook' ideas at the regional level for potential export to the global level, such as in the EES and the open method of co-ordination, serving to help transfer to the ILO major elements of the decent work agenda. Mutual learning has also continued between the two institutions, highlighting their normative coherence, such as on the specific priorities to be adopted by the EES, and highlighting the epistemic community of national, EU, ILO and also OECD officials in labour market policy. Beyond policy exchange, however, the ILO's work on CLS and 'fair globalization' has achieved a normative legitimacy that EU policies do not possess. ILO policies, while lacking some of the hard law characteristics of EU legislation, provide a values-based platform for the promotion of social policies across a broad cross-section of states. Building on this values-based legitimacy, within the social policy field, ILO policies can also lend the EU's own objectives more international credibility when the two are well aligned, such as in promoting gender equality.

Still, where EU and ILO legislation continue to co-exist there is a complicated legal tangle that 'includes questions of international, community, as well as national constitutional law' (Betten 1993b: 53). To date, these questions have still not been resolved, although EU and ILO officials have found ways of working in this complex and overlapping environment.

Part of this tension results from the fact that the Commission remains a non-voting observer at the ILO. Forced, ultimately, to stand back and watch member states decide whether to ratify conventions or not, and in the light of weak ILO enforcement mechanisms, the Commission has continued to press ahead with its own agenda of social policy legislation. The issue of competency and day-to-day leadership at the international level has been much more effectively resolved in the case of the WTO, where the European Communities are members, the Commission leads the policy co-ordination, and in which political direction and diplomatic *savoir-faire* have created a working method, even if they have not fully resolved uncertainty over competency on new issues.

In contrast, at the ILO, issues continue to be managed on a case-by-case basis. The informal state of relations is complicated by the EU's expanding agenda in the social field in each successive Treaty revision, and new forms of co-operation and rule-making, such as the open method of co-ordination. Objections by the social partners (trade unions and employers) to Commission entrepreneurship at the ILO, and national sensitivity about Commission leadership, indicate that a resolution of the questions around competency and who may 'speak for the EU' at the global level should not be expected. The uncertain and awkward relationship between EU and ILO legislation will continue. The ILO's Governing Body and the Legal Committee of the Governing Body, as well as ILO officials, have shown great resolve in consistently stating that the relationship of EU member states at the ILO is up to them to solve.

As regards external activities, or the management by the Commission of social policy issues outside the EU on behalf of member states, regional and global governance have proved much more compatible. It is in the promotion of normative standards for social policy in areas external to the EU where the ILO retains its greatest relevance to the Union's social policy agenda today. In the area of core standards, the ILO has 'reinvented itself as the primary and unique universal institution' (Murray 2001: 219) and, as we saw in the examination of the EU's GSP-plus regime, the Union has supported the ILO in these efforts, no doubt hoping to prove that it is not unilaterally applying CLS as a protectionist measure.

Still, some continue to question the EU's motivations in promoting the CLS and its commitment to the ILO decent work agenda and its own social policies. As Tonia Novitz argues in Chapter 2, the EU's Lisbon Strategy and its support for the ILO may be more strongly correlated to its interest in strengthening its 'market model' than promoting worker rights. However, faced with the option of leaving social policy to member states or, at the global level, 'going it alone' and using EU legislation rather than ILO Conventions as the standard, the Union has chosen to engage its member states actively on questions of pan-European social and labour market rights and, at the global level, work with the ILO to promote the adoption of the CLS both inside and outside the EU. Therefore, the choice for the Union is not between a 'social' or 'market' model, but how best to maintain and even enhance its commitment to worker rights – using both European and global-level tools to do so – while continuing to deliver improved productivity rates and economic growth in a market-based economy. The ongoing policy challenge for

the EU is not the tradeoffs between market-based economics and social policy so much as how best to ensure their integration.

There is also the question of how relevant the EU is to the ILO. When the EU serves as a kind of 'policy incubator' for the ILO, as in the decent work agenda example, the relationship can be seen as mutually beneficial. Normatively, and in the promotion of soft law types of activities, the EU and its member states are a major source of support for ILO activities. However, tensions between the Union and ILO governance are more acute on the hard law side of activities, especially in cases where the EU may push for an ILO Convention to reflect its own standards rather than an outcome that reflects the interests of a broader cross-section of ILO members (see also Chapter 6). The most critical observers at the ILO note that 'the EU destroys this place [the ILO] by creating a bloc position that is very difficult to move. Developing countries don't really like it, and in the end, ratifying ILO Conventions does not seem to be a priority of EU member states'. In the words of another ILO representative:

> The danger must be avoided of falling into the temptation – which experience has shown to be not imaginary – of shifting from a concern for compatibility to an insistence on conformity, by projecting Community solutions onto the international level, with all the undesirable consequences which this may entail.
>
> ILO (1994: para. 5)

As one official from an EU member state has stated: 'too many … Conventions have been modelled on Community standards so that no one could ratify them, not even the EC States' (ILO 1993: 3). For the ILO, maintaining its commitment to the universal improvement of working life while staying relevant to the EU and its member states is a great challenge (WCSDG 2004). For the EU, the need for internal policy coherence among its members and the desire to help find an effective compromise at the multilateral level will continue to challenge both the Commission and member states.

As this chapter shows, the EU–ILO relationship is at a very fruitful, if somewhat messy, stage. Clearly, the two institutions continue to have much to offer each other, and their largely compatible normative views on employment and labour issues indicate many interesting areas for co-operation, in particular around development issues, where a strategic partnership exists between the two organizations (see Chapter 1), gender equality and the treatment of workers in increasingly untraditional and non-unionized workplaces. The relationship is likely to remain messy, as the EU charts its own economic and foreign policy course, picking and choosing those areas where it can use multilateral governance, including the ILO, to its best advantage. Despite the fragmented nature of supranational social policy, how and why the EU chooses to support and promote ILO Conventions and its broader policy agenda remains highly relevant for those who wish to see people treated not only as an abundant source of labour and a key to growing prosperity, but also as fellow global citizens deserving of similar forms of treatment no matter what their country of origin.

Notes

1 The author wishes to thank Jan Orbie, Lisa Tortell and the participants of the workshop 'The EU and the Social Dimension of Globalization', held at DINẬMIA in Lisbon in March 2007, for their helpful comments on this chapter.
2 The chair of this report, Bertil Ohlin (former Swedish Minister of Commerce 1944–45 and former leader of the Liberal Party), went on to develop the highly influential Heckscher–Ohlin model of international trade, for which he won the Nobel Prize. The other members of the Group of Experts on Social Aspects of Problems of European Economic Integration were: Maurice Byé (France), T.U. Matthew (UK), Helmut Meinhold (Germany), Pasquale Saraceno (Italy) and Petrus J. Verdoorn (The Netherlands).
3 An early draft of the ILO–EEC Agreement in the ILO archives contains provisions for reciprocal representation in the form of mutual observer status but, for some unknown reason, these were not included in later drafts of the Agreement. An article permitting an ILO representative to be invited to the Economic and Social Committee (ESC) was also deleted from the draft Agreement.
4 Opinion 2/91 regarding ILO Convention No. 170 on Chemicals at Work, Decision of 19 March 1993 [1993] ECR I-1061.
5 It is interesting to note that member states have also resisted expanding the competence of the Commission on new trade issues at the WTO, where operating as a bloc is far more established, on issues such as trade in services (Meunier and Nicolaidis 1999). Exceptions to the Commission's leadership of trade policy at the WTO are negatively listed, however, and are very few in number when compared with the lack of any areas of exclusive EU competence in the social field.
6 The following member states have ratified Convention No. 183: Austria, Cyprus, Hungary, Italy, Lithuania, Romania and Slovakia.
7 Cyprus, Finland, Italy, Luxembourg, the Netherlands, Portugal, Slovenia, Sweden.
8 I am grateful to Don MacPhee at the Canadian Mission in Geneva, Chair of IMEC (2002), for his detailed explanation of IMEC procedures.
9 Council Regulation (EC) No. 2110/2005 of 14 December 2005, OJ L 344.
10 The other EU member states with representatives on the WCSDG were Italy, the UK (*ex officio*), France, Germany and the Netherlands.

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6 Writing a new normative standard?

EU member states and ILO conventions[1]

Robert Kissack

In recent years, there has been increased interest in the external relations of the European Union (EU) in the United Nations (UN) system, in general, and in the International Labour Organization (ILO) in particular. However, there are a number of different ways in which the relationship between the EU and the ILO can be analysed. One approach is to take their common interest in social and employment conditions as the departure point and analyse the ways in which the development of the first pillar of the EU has led to spillover into the ILO. Following this route, there is a long history of incremental convergence, seen through letters of exchange between the EU and the ILO, and co-ordinated actions by the European Commission and the EU member states to implement ILO labour standards, set out most comprehensively in a number of recent works (Johnson 2005; Delarue 2006; see Chapters 1 and 5).

An alternative approach to the study of EU–ILO relations is through the study of EU action in the UN system. International relations (IR) scholars been interested in the co-ordinated actions of EU member states in the UN since 1973 when West Germany joined the UN and the fledging European Political Co-operation (EPC) mechanism gained the CONUN working group to oversee common UN positions (Luif 2003).[2] Following the publication of a number of early studies measuring the voting cohesion of EU member states in the UN General Assembly (Hurwitz 1975; Lindemann 1978, 1982; Foot 1979), interest waned for over twenty years until a number of factors, *inter alia* the enlargement of the Union, the decline in US involvement and a questioning of the post-Cold War 'new world order', refocused scholarly attention on the General Assembly (Dedring 2002; Luif 2003; Johansson-Nogues 2004; Laatikainen 2004). Moreover, the EU's role in promoting multilateralism as a foreign policy objective came under increased scrutiny as a result of its prominence in the 2003 European Security Strategy (Smith and Elgström 2006; Laatikainen and Smith 2006). In line with this second approach, the study of EU–ILO relations can be regarded as a subset of EU–UN relations.

This chapter will follow the second approach to the study of the EU and the ILO. Its core argument can be summarized in two parts. First, there is an emerging body of literature on EU foreign policy (especially in relation to the UN) asserting that common, European values and principles set it apart from the *national* foreign policies of the member states, on the one hand, and other international

actors, on the other hand. EU foreign policy is 'normative'; it focuses on '*milieu* goals'; it is most importantly not driven by exclusive interests, but by inclusive values, the promotion of which need not threaten other states (Manners 2002; Smith 2003; Jörgensen and Laatikainen 2004). This claim is examined in detail, and it is argued that there are clearly universal norms, but none that can be seen as characterizing a specific EU normative outlook. Second, this chapter goes further by arguing that, in the ILO, there is clear evidence to show that the more active the EU is during the drafting of an ILO convention, the lower the number of ratifications it receives. Such findings strongly point towards the EU promoting exclusive European interests, rather than any form of inclusive values. In conclusion, while there is a *prima facie* claim to be made that the EU and the ILO work well together, closer inspection shows that, when the EU member states are at their most co-ordinated and active, their actions are actually detrimental to the aims of the ILO.

The chapter is divided into four sections. The first presents an overview of the differing approaches to the study of EU foreign policy, the arguments made in support of strong EU–ILO shared values and goals and also the arguments in favour of the EU possessing a unique sort of foreign policy geared towards the promotion of particular values and principles that stem from its unique identity. The second section presents empirical evidence on the ratification rates of core labour standards by all ILO members, showing that these standards are incapable of distinguishing between EU and non-EU members. The third looks at the correlation between the level of EU member state involvement in the drafting of all ILO conventions since 1973 and the number of ratifications by ILO members. Finally, the concluding remarks reconsider our understanding of the EU in the ILO in the light of the findings.

European Union foreign policy

To IR scholars who adhere to the realist school of thought, the EU cannot have a foreign policy; only its member states can. The constraints imposed upon states in the international system mean that they remain ultimately self-reliant when called upon to protect their sovereignty through recourse to war. Although there is a diverse body of thought regarding (a) why this is so – either human nature or the structure of the international system itself; and (b) how much power is necessary to achieve this goal of survival, realism remains fundamentally blind to the EU in the world (Morgenthau 1967; Waltz 1979). If foreign policy is taken to mean more than purely security, then there is room to study the relations between the EU and third states. If states are concerned with absolute rather than relative gains from co-operation, as liberal institutionalists argue, then there is room to study the reasons why EU member states co-operate together in the world as a whole (Keohane 1984; Grieco 1988). Nevertheless, the shadow cast by the assumption that sovereign states are the primary unit of the international system looms over two IR theories applied directly to the EU, namely intergovernmentalism and liberal intergovernmentalism (Hoffmann 1966; Moravcsik 1998). EU states will

only co-operate when it is in their national interest to do so, although the length of time over which they measure their gains from co-operation and their willingness to design and support institutions to help them differentiates the two. According to these theories, foreign policy co-operation between EU member states is limited in scope and always under threat from defection if vital national interests are challenged.

The idea that foreign policy co-operation between EU member states should not 'sully the pure milk of national foreign policies' (Nuttall 1997: 19) may have been the case in 1970 when six countries initiated EPC but, in the subsequent four decades, foreign policy co-operation now encompasses the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP). While the decision-making in both policies remains predominantly intergovernmental, it is clear that EU member states are attempting to build an institutional framework that helps them co-operate wherever possible. Michael E. Smith (2004) has noted the gradual institutionalization over time as informal practices have become formal procedures, while in the last ten years, there has been an evolution of decision-making into what Joleyn Howorth (2005) has termed 'supranational intergovernmentalism', whereby member states retain their sovereignty over decision-making (as opposed to pooling it under the Community method) but exercise it through consensus. The clearest example of this is in the phenomenon of 'Brusselization', whereby national governments relocate officials to Brussels in order to participate in EU institutions on a permanent basis (Allen 1998; Mueller-Brandeck-Bocquet 2002). Christopher Hill and Michael Smith (2005) have summed up the evolution of the EU as a political actor in the international system in three ways: as a subsystem, a process and a power. By 'subsystem', they refer to the unique way in which international relations is carried out among EU member states, in comparison to the wider international system which lags far behind in terms of interdependence and the absence of war (Keohane and Nye 1989; Cooper 2000). As a 'process', they refer to the continual growth and development of the pooling of sovereignty through political, economic and social ties, as well as the enlargement of the EU over time. Finally, as a 'power', they refer to the material capabilities of the EU to shape the international system, especially through its trade policies and development assistance (Smith 1998; Holland 2002).

While the EU may be developing ever more complex institutional arrangements for making foreign policies, are the interests of the EU member states converging over time and, if so, how is this process affected by successive enlargements? According to the logic of diversity expounded by intergovernmental approaches, as the membership of the EU grows through enlargement, the potential for interests between the member states to diverge will also grow. Finding consensus between twenty-seven states is much harder than between six and, as a result, EU foreign policy will become more diluted over time. To understand how the EU manages to maintain its foreign policy (or even to build up a more comprehensive policy over time) while simultaneously enlarging, scholars have turned to sociological theories that put emphasis on the ability of states to learn 'appropriate' behaviour, change their identity and adopt reflexive practices to determine

national interests (March and Olsen 1998; Tonra 2001). In contrast to interest-based theories that explain state behaviour through rational-choice modelling, which borrows heavily from 'neo-utilitarian' economic theory (Ruggie 1998), sociological approaches place emphasis on the shared norms and rules developed *between* states. Social relations are constructed between actors and, at the international level, relations between states also have a social dimension that is ignored by theories that assume a state's national interests are fixed over time and determined in isolation from their social setting (such as the realist focus on survival). Taking account of socially constructed identity, norms and rules in the study of EU foreign policy helps to understand how new member states adopt existing EU norms of behaviour, how their national identities become 'Europeanized' and why EU foreign policy has not unravelled over time as the EU has enlarged (Börzel and Risse 2003; Wong 2005).

Norms also influence how other states – not just EU member states – behave. As Chris Brown (2001: 437) points out, 'norm' has two meanings, and it is important to recognize the difference between them because they have sometimes been conflated in the past. The first is a pattern of accepted behaviour practised by states, and the second is a type of behaviour that is 'morally or otherwise desirable' and can be summarized as what *is* and what *should be*. Considerable attention has been paid to the idea that the EU can act as a 'normative power' (Manners 2002; Diez 2005; Manners and Diez 2007; see also Chapter 1) in the international system, defined by Manners (2002: 239) as the EU's 'ability to shape conceptions of "normal" in international relations'. Such power is thus the ability to alter over time 'what is', the common and expected behaviour of all states in the international system, not only EU states. If, according to this argument, the EU has the ability to determine future 'normal' behaviour, it follows that the EU must also be able to decide which norms will constitute this future behaviour, i.e. what *should* be deemed normal. According to Manners (2002: 241), the 'EU is founded on and has as its foreign and development policy objectives the consolidation of democracy, rule of law, and respect for human rights and fundamental freedoms', which together constitute the preferred EU future norms of the international system. The normative power of the EU is twofold: first, to determine normal behaviour – the norms of state action – and, second, to shape the world in a direction in keeping with the four stated EU values – normative in the sense of 'the good life'. As Manners (2002: 252) succinctly puts it, the EU is 'increasingly exercising normative power as it seeks to redefine international norms in its own image'.

What do various theories of EU foreign policy say about the ILO? From an intergovernmental perspective, the policy areas addressed in the ILO are likely to be of 'low politics' and the chances of member states being split is low; however, any common foreign policy will remain at the level of the lowest common denominator. From a liberal intergovernmental perspective, domestic constituents influence national positions in the ILO and, where domestic actors share EU-level interests, a coherent EU foreign policy is possible. When we turn to consider the importance of norms, the standard-setting practice of the ILO becomes an important source of potential normative power; ILO conventions represent consensus

on what *should be* in a given area (such as preventing child labour), and the ratification of ILO conventions is a record of what *is*. From the perspective of normative power, the EU can shape norms of desirable behaviour by influencing the content of ILO conventions (what *should be*), and can demonstrate leadership by ratifying conventions and thus shape norms of expected behaviour (what *is*).

The remainder of this chapter will examine the normative power of the EU in both dimensions distinguished by Brown, through the prism of the ILO. In the first case of norms as what is, we will look at the ratification rates of the EU member states over the eight core labour standards to see whether the EU leads through example when it comes to supporting current accepted behaviour. The second case of norms as what should be will examine the ability of EU member states to shape the content of new ILO conventions during the drafting process, and how widely those conventions are subsequently ratified. If the EU does exhibit normative power, we would expect it to play a strong role in shaping standards, and for those standards to become widely embraced by third states over time as the values of the EU shape the wider international system.

EU normative power to shape 'normal' behaviour

A significant achievement of the ILO during the past decade is the agreement reached between all ILO members on a set of core labour standards (see Chapter 1). These basic principles are embodied in eight ILO conventions that constitute the minimum accepted conditions of work that states must uphold in their domestic economy. In the language of norms, they are the lowest common denominator of acceptable state practice and are the norms of current practice, or of 'what is'. This section will look at what the EU is doing to promote these standards by looking at the behaviour of EU member states.

In 1995, the World Summit on Social Development (WSSD) mandated the ILO to co-ordinate an international effort to improve working conditions globally, using its established body of international labour standards, as well as the scrutiny and investigation methods prescribed by its constitution. The 1998 ILO Declaration on Fundamental Principles and Rights at Work (see Chapter 1) committed all members to ratify the core conventions as soon as possible and, since then, the ILO has worked towards its goal of universal ratification of the eight fundamental labour conventions. At the beginning of 2008, the total number of ratifications of these eight instruments by the 181 ILO members stood at 1,293, or 89 per cent.[3] This is an impressive statistic, although work continues towards reaching 100 per cent success, as well as the ongoing and more important task of ensuring compliance with the standards through the ILO's monitoring mechanisms.[4] Furthermore, the ILO has identified four more standards that it has labelled 'priority conventions', which expand the *acquis travillant* of the Organization.[5] On reflection, the ILO seems to have succeeded in achieving what the WSSD asked it to do.

How do core labour standards relate to the EU? There are, I would suggest, two basic ways that the EU can serve as a partner to the ILO and help promote core labour standards. The first is by the EU member states ratifying the eight

conventions, and the second is by promoting the standards to third states through the plethora of foreign policy tools at its disposal, including *inter alia* bilateral member state aid and diplomatic pressure, EU common statements and positions in support of ratification and speaking out against violations, and through the trade and development aid policies of the European Community working in a similar manner of 'carrot' and 'stick'. The two approaches can be denoted in shorthand as being 'intra-EU' and 'extra-EU', and are related insofar as asking third states to 'do as we ask' carries weight when supported by evidence of 'do as we do'. As early as 1979, the European Parliament warned EU member states that they should not make aid conditional on the ratification of standards that they themselves had not ratified (European Parliament 1979). If the EU is to promote core labour standards most effectively, it should be done through a combination of external promotion to third states and as a matter of good practice within its own member states. Can we read any greater significance into the ratification rate of EU member states of the eight fundamental conventions than it being merely 'good practice' designed to prevent embarrassment when third states scrutinize the EU itself? Alternatively, is evidence of high levels of ratifications by EU member states evidence that the EU takes core labour standards more seriously than others?

EU member states have a perfect record on ratifying the eight fundamental conventions following the ratifications by the Czech Republic and Estonia of Convention No. 138 in the first half of 2007. All twenty-seven EU member states have now ratified the eight core conventions, comparing favourably with the other developed states in the ILO with which they form the larger co-ordination group of industrialized market economy countries (IMEC). Of the seven remaining IMEC countries – Australia, Canada, Japan, New Zealand, Norway, Switzerland and the US – only Norway and Switzerland have ratified all eight core conventions; Australia has ratified seven; New Zealand and Japan have each ratified six; Canada has ratified five; and the US has ratified two. These findings are perhaps not surprising, insofar as the high number of ratifications in the two states nearest to the EU could be argued to demonstrate a diffusion of norms by the EU to its neighbouring 'like-minded' states. By a similar process, both Bulgaria and Romania ratified all eight conventions before entry into the EU on 1 January 2007 and, of the ten acceding states in May 2004, only three entered without all eight standards ratified (Czech Republic with one outstanding; Estonia with two outstanding; and Latvia with three outstanding).

Looking at the ratification data on all ILO members at the beginning of January 2008, 128 out of 181 states (71 per cent) have ratified all eight conventions. Therefore, while the EU compares favourably with the other IMEC states, EU member states appear decidedly average compared with the entire ILO membership, with 101 other states equally committed to current norms of behaviour (and nineteen more states have ratified seven core conventions). ILO core labour standards are clearly not particularly useful when searching for evidence supporting the claim that the EU is a normative power in the vanguard of demonstrating compliance with existing international legal norms. EU member states are not in any way different from the majority of other states and have even lagged behind

the majority. This should not come as a surprise, as measuring normative power through core labour standard ratification is a crude method that fails to take into account a number of other variables.

The first significant consideration missed by looking at the ratification of conventions alone is the more important issue of the enforcement of core standards. In order to do this, attention should be paid to the work of the three committees (Committee of Experts on the Application of Conventions and Recommendations (CEACR), Conference Committee on the Application of Standards (CAS) and Committee on Freedom of Association (CFA))[6] that monitor labour standards, as well as to which states violate the standards, how often and how severely. The case of forced labour in Myanmar (Burma) that was drawn to the attention of the ILO in 1996 illustrates that ratification alone does not ensure the protection of rights (ILO 2000).[7] Pursuing this avenue of investigation would show to what extent ratification is an effective guarantee that standards will be protected, and whether some states perform better than others in successfully implementing standards, as Novitz has done convincingly (see Chapter 2).

The second response is that the ratification of core labour standards is a useful and important measure, but consideration needs to be given to how the EU made the ratification of core labour standards part of third states' national interests. Here, the EU has played an important role in promoting ILO standards through granting preferential trade relations to states able to demonstrate the protection of labour standards, while penalising those that fail (see Chapter 9). Following the definition of 'power' as the ability to make a state do something that it would otherwise not do, the EU as a normative power works along these lines, making the ratification of ILO conventions in the self-interest of other states. Importantly for the normative power argument, the EU is capable of shaping the international environment in such a way to make the norm of core labour standard acceptance an important one in terms of the trade and aid relations offered by the EU.

The final response reiterates the difference between the EU and its member states, arguing that the EU cannot be reduced to the aggregate number of ratifications by its member states in the ILO. Although the EU does not have legal personality, and the European Community is unlikely to become a member of the ILO for the foreseeable future, this does not mean that the European Community has no relationship with the ILO exclusive of its member states. The European Commission played an important role contributing to the ILO's World Commission on the Social Dimension of Globalization and has represented the European Community on the Social Dimension of Globalization working party of the Governing Body since 2001; a number of initiatives are under way to improve the exchange of information about best practice (see Chapter 5 and Delarue 2006 for a fuller account of the current breadth of co-operation between the European Commission and the ILO).

EU normative power to shape future norms

The second definition of a norm as identified by Brown was as a morally right form of behaviour, paraphrased here as what 'should be'. Within the specific context

of this chapter, the drafting of ILO instruments constitutes a codification of future aspirations for labour standards acceptable to all ILO members. The exact content of an instrument is agreed through a lengthy negotiation process designed to search for consensus and, during these meetings, a number of opinions are considered before agreement is reached. To what extent are EU member states able to shape the drafting process and influence the final outcome of an instrument? How can their influence be measured? About which instruments have they been most vocal during the drafting process, and about which have they remained silent? Finally, after having established the degree of EU member state involvement in the drafting process, what becomes of the instruments thereafter? According to the normative power hypothesis, the EU is able to promote adherence to international norms through example and incentives. Does a prominent role for the EU in the drafting process lead to more widely accepted ILO instruments?

The first step in analysing this problem is to measure the level of EU member state involvement in the drafting process, which is defined as the number of interventions made in the name of the EU member states (either by EC diplomats or those from the government holding the Presidency of the Council). An intervention can take one of five forms: (i) give an opinion in the preliminary discussion of the topic; (ii) propose amendments; (iii) propose sub-amendments to an existing amendment; (iv) speak in support of or against an amendment; (v) vote to accept an amendment when consensus is not reached (and all bar the final one can be carried out on behalf of the member states by European Commission diplomats).

The method used in the following analysis counts each intervention made in the name of the EU in the official minutes (i.e. the ILC Provisional Records) during each drafting meeting for the last fifty ILO conventions since the Minimum Age of Employment Convention, 1973 (No. 138), the first year the EU (then EC) member states spoke collectively through the Presidency. No distinction is made between the types of intervention on the grounds that all five represent the necessary attributes of an effective actor capable of promoting its interests in the ILO. In order to scale the number of interventions to the length of the meeting, the number of interventions is divided by the length of the meeting, measured in paragraphs. A paragraph approximates to one substantive point of the discussion and is a summary of the debate rather than a transcription of what was said.[8] The figure arrived at is presented as a decimal relating to the intensity of EU involvement in the drafting process. For example, a total of thirty interventions made during a drafting process minuted in 300 paragraphs would be recorded as 0.10.[9]

For each convention between Convention No. 138 and Convention No. 187, the same procedure was carried out, whereby the total number of interventions in the name of the EU was divided by the number of paragraphs of the minuted record. Table 6.1 summarizes the findings, listing the fifty conventions in five separate sections, sorted by the intensity of EU interventions during their drafting. Additionally, the number of ratifications by all ILO members is listed for each convention. The five sections (1–10, 11–20, etc.) show the data as quintiles, with the highest level of EU intervention on the left and the lowest on the

Table 6.1 ILO Conventions Nos 138–87 sorted by level of EU co-ordination: number of ratifications by all ILO members

1–10 Con. Intensity Rat.	*11–20 Con. Intensity Rat.*	*21–30 Con. Intensity Rat.*	*31–40 Con. Intensity Rat.*	*41–50 Con. Intensity Rat.*
167 0.198 20	160 0.101 46	175 0.038 11	183 0.008 13	150 0.000 67
161 0.197 26	162 0.097 31	166 0.034 13	158 0.007 34	151 0.000 44
155 0.186 50	171 0.096 9	187 0.034 1	182 0.005 165	152 0.000 26
172 0.178 14	153 0.081 8	138 0.025 150	185 0.003 12	154 0.000 38
170 0.173 16	147 0.072 55	145 0.024 17	177 0.002 5	157 0.000 3
184 0.169 8	173 0.072 19	143 0.019 23	140 0.000 34	163 0.000 16
168 0.152 7	181 0.064 20	186 0.014 2	141 0.000 40	169 0.000 19
164 0.147 14	146 0.053 17	159 0.013 80	142 0.000 65	178 0.000 13
174 0.142 11	165 0.041 3	156 0.010 39	144 0.000 121	179 0.000 10
176 0.132 21	148 0.038 44	139 0.008 36	149 0.000 38	180 0.000 21
Average rats: 18.7	Average rats: 25.2	Average rats: 37.2	Average rats: 52.7	Average rats: 25.7
Average year: 1990	Average year: 1985	Average year: 1986	Average year: 1986	Average year: 1987

Con., convention; Rat., ratification.

right. The average number of ratifications of the conventions in each quintile is also shown and reads as follows: 18.7, 25.2, 37.5, 55.6 and 22.8.

The overall trend evidenced by these data is striking: the fewer interventions made in the name of the EU during the drafting of an instrument, the more ratifications an instrument is likely to receive.[10] "Part of the explanation for this trend can be seen through reading the average year, calculated by averaging the year of ratification of the ten conventions in the quintile. Older conventions were drafted at a time when EU co-ordination was less well developed, and have had longer for ILO members to ratify them. While some correlation between average age and average number of ratifications is to be expected, the 'youngest' quintile of conventions still average eighteen years of age, and the range between the 'oldest' quintile and the 'youngest' is relatively small at five years and thus unlikely to be a significant variable. On reflection, the correlation between EU interventions during the drafting of an instrument and the number of ratifications it receives thereafter remains relevant. When the EU attempts to shape future norms through influencing the content of ILO standards, those standards remain largely unsupported by the wider community of states. The EU's normative power credentials are once again called into question. More broadly, these findings point to a fundamental clash of interests between the EU and the ILO in the area of standard setting. The stronger the role played by the EU in the drafting process, the weaker the binding nature of the resulting convention as a result of its lower level of ratification. Non-ratified conventions are incapable of protecting working conditions.

Finding a fundamental clash of interests between the EU and the ILO appears paradoxical, especially given the considerable amount of evidence suggesting the harmony of interests underpinning the EU's social model with the objectives of

the ILO's decent work agenda (see Chapter 1). In order to substantiate these findings, three alternative explanations for these results are considered here. The first two explanations can be summarized in the following question: is the EU being bad, or just 'being'? 'Being bad' is shorthand for the EU member states actively participating in the negotiation of a convention with the intention of shaping the eventual outcome as close as possible to their own interests. This explanation fits with the liberal intergovernmental approach to the study of the EU, where national interests are promoted through the EU when common agreement can be found. The most obvious reason for this is to protect the higher levels of social welfare and employment protection enjoyed in the EU from the threat of competition from the developing world. The interests of all EU member states are easily reconciled in a strong common representation that seeks to make ILO standards as maximal as possible, thus minimizing the competitive advantages of lower income countries. The problem with this behaviour is that an agreed ILO convention becomes too great and expensive to implement by developing countries and therefore will not be ratified by the states that the EU hopes will adopt them. One example fitting this explanation is the 2001 Convention on Health and Safety in Agriculture (No. 184). The EU Presidency proposed incorporating text into the convention relating to the use of chemicals that was very closely based on existing EU directives.[11] The record of ratification of this convention speaks for itself: the convention has eight ratifications in total, including Finland and Sweden (which were EU members in 2001) and Slovakia. Without interviewing the EU representatives present during the negotiations, it is not possible to speculate on their motivations behind promoting standards close to existing EU ones (whether benign or malign). However, the outcome shows that ILO members have not embraced the convention in an area of importance to many of them.

Alternatively, can an explanation for the EU's behaviour be put down to the EU just 'being'? By this, I mean that the presence of the EU in the ILO has an effect on the way the negotiating process works, and through non-volitional actions influences the outcomes of convention-drafting procedure. As the EU has grown in size and put itself under increased pressure to co-ordinate common positions, the voting weight with which it backs up its interests has grown. Although many regional blocs co-ordinate in the drafting of conventions, the EU does so with increasing frequency, in more policy areas and with more resources behind it. One explanation for the observed action is that the traditional process of consensus building between tripartite constituents is being undermined by the EU's size (twenty-seven states) disrupting the equilibrium. While African states may co-ordinate and speak through one representative, they rarely have over fifty delegates sitting in the meeting and voting when called upon to do so. To illustrate, during the drafting process, the tripartite representatives present are given weighted votes so that the combined votes of the government, worker and employer representatives are equal (one-third in total). When contentious issues cannot be agreed by consensus, a record vote will be called and, almost invariably, workers and employers find themselves in opposing camps. The balance of power hangs with the states present and, given that rarely more than seventy

or eighty governments send experts to drafting meetings, the twenty-seven EU member state votes place them in a strong position to determine the outcome. These actions do not constitute an abuse of power by the EU, simply that it is likely to find itself able to shape the ILO conventions in a way that privileges its interests over other actors.

Finally, the third explanation as to why high-intensity interventions take place in conventions that receive few ratifications reverses the explanatory logic between cause and effect and draws on the intergovernmental approach. EU member states are willing to co-ordinate in areas of low salience but, when it comes to a convention relating to an issue of national importance, they would rather act independently of the EU during the drafting of the convention. This distinction between high and low salience is reflected across the whole of the ILO membership, and thus it is the nature of the instrument that determines *both* the level of EU interventions *and* overall ratification levels. This challenges the assumption that EU member states allocate finite resources primarily to co-ordinating common interventions in areas of high salience. The definition of high and low saliency is an important one, and it is necessary to distinguish between an issue of high economic and social salience but low political salience (such as health and safety legislation), and high political salience but low economic salience (such as a framework for the abolition of child labour), where political salience is related to issues likely to influence domestic voters. EU member state governments may want to 'take ownership' of politically salient policy-making, but are happy for the EU to co-ordinate in economic and socially salient issues.

Conclusion

This chapter has used IR theories that explain the behaviour of states in the international system in general, and the behaviour of EU member states in particular, to analyse the EU's relations with the ILO. Not surprisingly for what is overwhelmingly a state-centric discipline, the focus has been on EU member states rather than the institutions of the EU, and this is justified given the fact that the member states are ILO members, hold voting rights in the organization and ratifying its conventions. Within this framework, the role of the EU has been studied as part of the foreign policy apparatus of the member states, and particular attention was paid to the idea that, through the EU, a unique form of foreign policy is possible.

The chapter looked in detail at normative power, both as a description of what sort of foreign policy actor the EU is and as a framework for examining the ratification of core labour standards and in the drafting of new labour standards. The overarching questions guiding this investigation were the extent to which EU member states are able to promote current norms of behaviour (what is) and the extent to which they are able to shape future norms of desirable behaviour (what should be). We found that the EU compares favourably with other IMEC states in terms of the number of core labour standards ratified, yet it is distinctly ordinary compared with the wider ILO membership. It was concluded that the EU's normative power is not identifiable from this crude measure alone, and the

wider acceptance of the importance of norms could be due to EU incentives found elsewhere.

Moving on to the question of how successfully the EU member states are able to shape future norms, attention was turned to the relationship between the intensity of EU interventions in the drafting of an ILO convention and its subsequent number of ratifications. By looking at the last fifty conventions, a general trend was identified where the more actively the EU participated in the drafting of a convention, the less widely ratified it was. This evidence raised the question of how to explain a fundamental clash of interests between the EU and the ILO. Three answers were suggested, one based on the pursuit of material interests, another based on national interests and a third on institutional procedures that were (unintentionally) counterproductive. Elements of all three answers appear valid. The desire of the EU to speak with a co-ordinated, single voice at the ILO has increased over time, although the level of common representation was extremely high during the 1980s as well as more recently in the last decade. It is easier to start with policies already agreed upon, increasing the tendency of EU member states to promote the content of the *acquis communautaire*. Added to this is the tendency for EU member states to co-ordinate more intensely in issue areas where a high level of integration already takes place, especially in occupational health and safety. As Moravcsik (1998) has argued, governments are happy to legislate such technical issues at the European level because, in the eyes of electorates, national sovereignty is not infringed upon. However, as ethical trading standards gain increased political salience, political capital can be gained through being seen to be active in the ILO. In such cases, national governments still want to play a visible role (such as in the large extra-budgetary payments made to the ILO programme to eradicate child labour by Germany and the UK). On reflection, there are undoubtedly more commonalities uniting the EU and the ILO than dividing them, but a strong EU of twenty-seven government members has the potential to unbalance the tripartite system of the ILO, both as a geographic region among several and as a supranational political system without complementary tripartite components. A mutual harmony of interests between the two cannot be assumed; it must be worked towards if the normative potential of the EU is to be channelled effectively in the ILO.

Notes

1 The author would like to thank Jan Orbie and Lisa Tortell for their helpful comments, and Ulrich Sedelmeier for comments on an earlier draft.
2 It should be noted that West Germany rejoined the ILO in 1954, one year after the first ECSC–ILO agreement was signed in 1953.
3 Available at http://www.ilo.org/ilolex/english/docs/declworld.htm (accessed 6 January 2008).
4 The monitoring process is carried out annually. Governments are requested to submit information to the Committee of Experts on the Application of Conventions and Recommendations (CEACR). This body of legal experts prepares an annual report for the Committee on the Application of Standards (CAS), which is made up of tripartite representatives who meet at the International Labour Conference (ILC) every summer. A third Committee on Freedom of Association (CFA) meets three times a year to

oversee infringements of the two primary instruments protecting freedom of association (Convention Nos 87 and 98).

5 These are in the fields of employment (Convention No. 122), labour inspection (Convention Nos 81 and 129) and tripartite consultation (Convention No. 144). Available at http://webfusion.ilo.org/public/db/standards/normes/appl/appl-RatifPriority Ctry.cfm?hdroff=1&Lang=EN (accessed 3 January 2007).

6 See note 5.

7 This is the most extreme case, but tens of violations annually are deemed serious enough to be raised at the CAS.

8 This varies slightly as the *rapporteur* of each drafting committee is seconded from a national government and styles change over time. The data are part of a larger study (see Kissack 2006).

9 It is not to be assumed that the EU spoke for 10 per cent of the time. Many members may be listed in a paragraph, and some may be listed more than once if they have first proposed an issue and additionally amended it.

10 From C140: in column 4 to C180 in column 5, no convention was drafted with interventions from the EU. These 15 conventions have been listed in order of completion, hence skewing the data in column 5 towards newer conventions with fewer ratifications. Combining the data in columns 4 and 5 gives an average number of ratifications of 39.2, fitting the established trend.

11 The convention borrows heavily on an EU Directive concerning biohazards. As a spokesperson for the EU Presidency said: 'The amendment was motivated by the fact that, while the Office text was comprehensive in its treatment of chemicals and animal handling, it paid too little attention to the risks associated with biological agents of vegetable origin ....Such risks were already covered by the European Commission Directive 2000/54/EC concerning the protection of workers from risks related to exposure to biological agents at work' (ILO 2001).

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7 The EU and the ILO Maritime Labour Convention

'In our common interest and in the interest of the world'[1]

Lisa Tortell, Rudi Delarue[2] *and Jeffrey Kenner*

The new maritime labour convention (MLC) is the mammoth result of a mammoth undertaking.[3] It is both a consolidation of more than sixty existing conventions and recommendations concerning seafarers, and their updating, extension and elaboration in a format that is unique among the International Labour Organization's (ILO) standards instruments. Heralded as the way of the future for the ILO, and positioned explicitly as a response to globalization (e.g. Director General's Statement 2006), the convention has equally been an area of great activity by the European Union (EU). As such, it allows for an interesting analysis of the way in which the EU and the ILO interact in relation to the social dimension of globalization.

In comparison with the core labour conventions that set out labour standards for all workers and all employers internationally (see Chapter 1), the MLC approaches seafarers' rights in a sectoral manner.[4] The Director General has talked of it 'making labour history' (Director General's Statement 2006); it is 'highly innovative compared with previous international labour standards in terms of structure, content and procedures for revision' (Bollé 2006: 135); and it has the 'potential to give ILO standard-setting a new and exciting direction' (Doumbia-Henry and Hahn 2008). It is innovative not in relation to the substance of its provisions, but in relation to the approach it takes, in particular to enforcement and amendment.

According to ILO statistics, more than 1.2 million people work in the maritime sector worldwide (Maritime Labour Convention website). This large number of individuals comes from almost every country in the world. They work on ships that may be registered in countries other than their own, with colleagues from various nationalities. By definition, these ships move around the world's seas, engaged in the real world experience of global trade and exchange. It is a quintessentially globalized workplace, workforce and industry.

In general terms, the sector has special features that mark its workers out as particularly vulnerable to poorly observed basic labour standards. The employment is often dangerous, with a high risk of accidents and the potential to result in 'the loss of human lives and severe environmental damage' (Doumbia-Henry and Hahn 2008).[5] Often, seafarers are apart from their normal life for long periods of time, both living and working aboard the ship, together with both their colleagues and their direct managers. Traditionally, large parts of the sector are poorly paid

with inadequate or uneven social security coverage, and a large number of workers are untrained or under-trained. Staffing levels are not always adequate. The re-flagging of ships with 'flags of convenience' has contributed to the erosion of the effective application of international and national labour and other standards by flag states. Core labour standards are not often enforced aboard ship, and generalized standards are difficult to apply in such a context.

From the time that the ILO began the negotiations and preparations for the new Convention in this sector, the EU has been involved at what has generally been accepted as being an unprecedented level (Delarue 2006). This chapter will consider the MLC as a concrete example of the EU's approach to the human element of globalization and, in particular, the rights and protections afforded to workers in the maritime sector, the original global industry. It will attempt to answer the question of why the EU has been so active in relation to the MLC. The chapter will commence by introducing the convention and the approach it takes to maritime labour standards, thus explaining its novelty. It will then set out the way in which the EU has been involved in the MLC's elaboration, preparation and adoption; consider the way in which it will impact upon the EU's own maritime labour norms; and, finally, address the way in which the Union is currently involved in the process of ratification and implementation. Finally, the chapter will conclude that the EU has been such an enthusiastic participant in the MLC project because, in the first place, it is in its own self-interest to construct a global level playing field in the maritime sector. Nevertheless, this is not a sufficient reason for the level of involvement by the EU, which must also result from a group of other interlinked reasons including the value placed by the EU and its institutions on both the ILO–EU relationship and the social dimension of globalization.

The Maritime Labour Convention

The maritime sector has had special status in the ILO since its inception (Bollé 2006: 135–37). The first maritime conventions were adopted in 1920, one year after the ILO was founded. In addition, it is the only sector with a special procedure. The Joint Maritime Commission, which meets every five years and is composed of twenty ship owners and twenty seafarers, considers the adoption of new standards or the revision of existing standards. The Preparatory Technical Maritime Conference is a tripartite meeting that is convened when necessary to set the agenda for a forthcoming International Maritime Labour Conference. This conference uniquely considers the specificities of the sector and either adopts or revises maritime conventions and recommendations. It takes place approximately every ten years. The MLC was the outcome of just such a process, being adopted by a Maritime Session of the ILC in February 2006.[6] It is intended 'to become the "fourth pillar" of the international maritime regulatory regime', together with three key International Maritime Organization conventions (Doumbia-Henry *et al.* 2006).

The MLC is composed of Articles, Regulations and a Code. The Articles are mandatory and are written in 'plain' language. They include reference to fundamental labour rights, implementation and enforcement, a new procedure for

amendment and a new Tripartite Maritime Committee. The Code includes a mandatory part A and non-mandatory part B and is divided into five titles, each of which groups together the mandatory and non-mandatory standards by subject matter. Each mandatory Regulation is followed by one or more mandatory 'standards' and one or more non-mandatory 'guidelines'. These provide the 'technical details for the implementation of the broadly worded Regulation' (Bollé 2006: 139). Member states must agree to be bound by the mandatory articles, regulations and standards, but are not bound to adhere to the non-mandatory guidelines. Rather, they must give 'due consideration' to implementing the mandatory parts of the MLC in the manner provided for in the guidelines, and may be required to justify their choice to do otherwise in the general supervisory system.

The MLC is, first and foremost, a consolidation of the previously existing corpus of ILO law relating to seafarers' labour standards; there is no questioning of the existing law. As a result, the MLC consolidates almost all the pre-existing ILO conventions,[7] but 'modifications of existing standards have essentially been restricted to updating matters of detail that were not considered to give rise to controversy or to resolving inconsistencies among the Conventions concerned' (ILO 2005: 9). The revision was most substantial in relation to the determination of applicable social security rules.

In terms of coverage of the Convention, the definitions used are intended to be broad and to allow maximum coverage.[8] The MLC covers all workers considered to be seafarers, which is defined to mean 'any person who is employed or engaged or works in any capacity on board a ship' to which the MLC applies (Art II (f)). The MLC allows for some exclusion of categories of persons. To be covered by the MLC, a ship must be 'one which navigates exclusively in inland waters or waters within or closely adjacent to sheltered waters or areas where port regulations apply' (Art II (i)). The convention is not applicable to the fishing sector, nor to warships or ships of traditional build. In general, the MLC applies only to ships of 500 gross tonnage or over that are engaged in international voyages or operate between ports of a country other than the flag state.

The definition of ship owner is equally inclusive and is based on the principle that ship owners are the responsible employers of all seafarers aboard a ship (ILO 2005: 16). The first title of the MLC states that seafarers may only work on board ship if they are over sixteen years of age (or eighteen for night work) and are trained and certified as medically fit; recruitment and placement services must function in accordance with seafarers' rights. The second title guarantees decent work and living conditions, to be included in employment agreements signed by both the seafarer and the ship owner. Their hours of work and rest must be regulated, and they should include leave. They can work for no more than fourteen hours in a twenty-four-hour period, and no more than seventy-two hours in a seven-day period. The third title concerns life on board ship: seafarers should have decent accommodation and recreational facilities and appropriate food and water, with standards and guidelines on a wide range of matters such as ventilation, noise and vibration. The fourth title concerns health and social security and contains new subject matter in relation to occupational health and safety and the effects of noise and vibration on

workers. Members must ensure that there is health protection and medical care on board ship; and ship owners must provide assistance to seafarers as a result of sickness, injury or death occurring in connection with their employment. Members should also take steps to cover longer term risks such as pensions, access to health care or family benefits to all seafarers 'ordinarily resident in its territory'.

Other than as a comprehensive grouping together of the relevant standards with a focus on increased clarity and consistency between the provisions, the substantive content of the MLC labour standards is not what is groundbreaking about this document. Nevertheless, '[w]hile the *substantive content* of the up-to-date Conventions has been retained, a different *approach* has been taken' (Doumbia-Henry 2004: 322). The fifth title, concerning compliance and enforcement, is of key importance as it aims at ensuring an effective level playing field by providing for both flag state and port state control, by imposing labour-supplying responsibilities and by introducing the maritime labour certificate and declaration of maritime compliance. The title combines the usual ILO enforcement mechanisms of inspection and periodic reports under Article 22 of the ILO Constitution, together with a mandatory certification regime.

Maritime labour certificates will be issued by national authorities and will constitute *prima facie* evidence that the MLC's requirements are met by that particular ship. The declaration of maritime labour compliance, in comparison, will have two parts: the national authority will set out the national-level embodiment of the MLC; and individual ship owners will set out the measures taken on the particular ship to ensure compliance. The belief is that, by requiring member states, unusually, to document their implementation of the convention, this will 'enhance the effectiveness of the supervision carried out at the international level' (Doumbia-Henry and Hahn 2008). The maritime labour certificate may be withdrawn following a negative inspection.

Member states that carry out port state control inspections must accept maritime labour certificates and declarations as *prima facie* evidence of compliance with the requirements of the Convention. This means that, assuming no problems are identified on review of the documents (and no complaints have been made), ships with certificates will not be subject to a more detailed inspection in foreign states. More detailed inspections are carried out in certain circumstances set out in the MLC, such as if there are clear grounds for believing that conditions are not in conformity or in the case of a complaint that specific conditions are in breach. For ships without such a certificate and declaration – that is, those from flag states that have not ratified or implemented the MLC – the principle of 'no more favourable treatment' is applied, meaning that such ships will be subject to a detailed inspection, taking considerably more time and effort. This is considered to be a strong incentive to ratification and implementation of the Convention to avoid the resulting disadvantage. The MLC is being championed as a means of ensuring that countries that ratify the convention will be protected against 'unfair competition from substandard ships' (Doumbia-Henry and Hahn 2008).

Maximum ratification and implementation were key, as a major purpose of the Convention was to combat the belief that 'the existing instruments were losing

their relevance' (Doumbia-Henry *et al*. 2006: 1): they were unevenly applied and enforced, not widely ratified, and amendment procedures could not respond to technical advances. Low levels of ratification were seen as attributable to the 'high level of detail, contained in one or two mandatory provisions, that creates an obstacle to ratification for certain countries even though the system of protection in the areas covered may be at least as strong in the countries concerned as that required under the Convention' (Doumbia-Henry 2004: 324).

To combat this, and in addition to the 'no more favourable treatment' provisions, the MLC has been described as 'firm on rights and flexible on implementation' ('Frequently asked questions', ILO website). The idea is that the Convention sets out the content of seafarers' social and labour rights in firm, but generally worded, statements, but allows countries freedom in the way in which these are implemented in the national context. There is also an allowance for 'substantial equivalence', whereby national legislation that is substantially equivalent could be considered to fulfil the requirements of the MLC (Doumbia-Henry 2004: 325).[9]

In terms of the need to ensure a simplified and responsive amendment procedure, the mandatory parts of the MLC require amendment in the traditional manner, but the non-mandatory and technical guidelines in its Code may be amended more easily. That is, any amendments to the Code will be drafted and adopted by a new tripartite committee, which will submit them to the ILC for approval; unless a member state objects, the amendments will take effect.[10] The ILO hopes that this will 'ensure the longevity of the Convention', permitting adaptations to respond to 'the ever-changing maritime industry … while at the same time upholding the rights and principles enshrined' in the convention (Doumbia-Henry and Hahn 2008).

The MLC will not come into force until twelve months after ratification by at least thirty member states of the ILO, representing a total share of at least 33 per cent of the world's gross tonnage of ships. The ILO has created the target of having the necessary ratifications within five years of the adoption of the Convention in 2011 (ILO 2007: 6). The ILO is accordingly targeting certain countries in its campaign for implementation – important flag states such as Panama, Liberia and the Bahamas; important labour supply states such as the Philippines; important port states such as Canada; and countries such as Russia, which are important in all three areas. To date, there have been three ratifications of the Convention, accounting for a significant percentage of the world's total tonnage: Liberia,11 the Marshall Islands[12] and the Bahamas.[13]

The ratification process itself is rather onerous, requiring the identification of institutions within the country that will undertake the duties created in the MLC and the preparation of national legislation. There have been various ILO missions undertaken to particular countries and regions, with an emphasis being placed on the role played by the social partners. For example, in September 2006, a regional tripartite seminar was held in Bulgaria, and considerable efforts have been made in the EU in relation to the ratification of the Convention by European nations. The ILO's actions in this regard are being carried out in accordance with an Action Plan for 2006–11 (ILO 2007).

The EU and the Maritime Labour Convention

The negotiation and adoption process

The MLC as adopted was 'the result of a highly intensive and extensive tripartite consultation process' (Doumbia-Henry 2004: 320). This process enabled 'the normal, lengthy amendment procedures' to be avoided (Doumbia-Henry and Hahn 2008) and resulted in the Convention's unanimous adoption by the ILC in 2006, evincing consensus among governments, ship owners and seafarers. This negotiation phase lasted for five years (ILO 2006) and 'led to the development of concrete tripartite solutions to address highly sensitive issues' (Doumbia-Henry *et al.* 2006: 2). This was, the Director General tells us, the first time in which a comprehensive set of labour standards had been adopted without the opposition of any of its tripartite stakeholders (Director General's Statement 2006: 2).

The role of the EU in this process was significant and illustrates the changing role of the EU – and the European Commission – in relation to the ILO. The EC/EU actively participated in the search for global and tripartite compromises from the 2004 High level Tripartite Working Group on Maritime Standards until 2006, when the draft text was finalized and subsequently adopted, holding intensive co-ordination meetings both during ILO tripartite sessions and in Brussels. This was at the initiative of the Commission (member states expert meetings) as well as the Presidency (in the context of the Council) (on this point, see Chapter 5). This co-ordination enabled the EU to be well prepared for the tripartite meetings, having developed and assessed amendments from other groups and countries and prepared positions and strategies for discussions.

The co-ordination was particularly strong as, on 21 April 2005, the EU Council of Ministers had adopted a negotiating mandate on the conclusion of the MLC that obliged member states to co-operate with the European Commission to ensure consistency with EU legislation. This was all the more important as the ILO text directly affected EC exclusive competences on the co-ordination of social security schemes, as well as many EC shared competences in the field of labour law, working conditions, health and safety at work, non-discrimination at work and maritime transport.[14] The 2005 Council mandate also facilitated the work of the European Commission and the successive EU Presidencies (and of EU member states that represented the EU at the request of the EU Presidency) at the successive ILO meetings in 2004–6.

While the *acquis communautaire* facilitated the preparation of EU positions, the EU went beyond its more usual role of simply ensuring full legal consistency with EU legislation. In this, the EU's role in relation to the MLC differed from other examples in the past, reflecting the new relationship in line with the 2001 Exchange of Letters between the ILO and EU (see Chapter 1), and with a progressively established practice developed in recent ILCs. This evolution resulted in a more visible, coherent and outward looking EU than at previous ILO official meetings, at which the EU role had been oriented mainly towards ensuring compatibility with EU legislation.

The EU's involvement in the MLC process continued beyond the preparation phase into the adoption phase. The EU was again heavily involved in the special maritime session of the ILC in 2006, which determined the final shape of the Convention, and ultimately adopted the text. During the Committee of the Whole that was established to deal with the drafting amendments to the MLC, there are numerous instances in which EU member states presented a co-ordinated position, or referred to 'European standards'.[15] Even more concretely, the EU funded the conference through a subvention up to a maximum 1.7 million euros from the maritime safety budget. Further, it supported the preparation of manuals and other materials with a subvention of a maximum 331,000 euros from the social dialogue and industrial relations budget.[16]

Towards the end of the 2006 ILC session, the European Commission's intervention emphasized that the Union had 'made every effort to facilitate progress in the discussions, coordinating the positions of its individual members and tabling proposals' (ILO 2006). This was to continue as the EU 'intends to be, in the sphere of maritime labour issues, a powerful source to the International Labour Organisation. To do so is in our common interest, and in the interest of the world'.[17] In closing the session, the President of the Committee thanked the Commission, 'without whose help it would not have been possible to hold this Conference, as well as the European Union, its Member States and associated States for their active participation in drafting this Convention' (ILO 2006).

The consequences for EU law

The MLC 'touch[es] upon an impressive number of EC Directives and Regulations', concerned with areas of direct competence as well as competence shared with member states (Delarue 2006: 100). Moreover, the inherent flexibility of the MLC, allowing for implementation through collective agreements or the adoption of more favourable provisions, fits with the EU's own preference for setting a floor of minimum standards and promoting sector-specific social dialogue.

Nevertheless, it remains to be seen whether the adoption of the MLC will trigger action to address two problematic features of the EU's system of social regulation, especially in the maritime sector. The first of these arises from the treatment of the maritime sector as an exception in the sense that the sector as a whole, or parts thereof, is excluded from certain areas of EU social legislation or made subject to derogations. Such exceptional treatment of the maritime sector is, of course, not unique to the EU – it has been a trait of maritime law at regional and international level – but how far is the EU prepared to eradicate inequalities that exclude or diminish the protection of maritime workers under its own rules? The second problem concerns the tension, inherent within the EC Treaty, between its economic and social provisions. The recent European Court of Justice decision in the *Viking Line* case[18] has highlighted how it is possible that the right of seafarers to take collective action to prevent social dumping, which is recognized by the Court as a fundamental social right, can nevertheless be trumped by the right of ship owners to switch national flags – even between member states – as part of the exercise of their right

of establishment in any state within the EU (see Chapter 2). Ultimately, it is a matter for national courts in each case to determine whether or not such collective action is proportionate to the legitimate aim of protecting workers' interests.

For the purposes of this chapter, we will consider how far, if at all, it is necessary for the EU to address the issue of exceptional treatment of the maritime sector as part of its reappraisal of labour standards pursuant to the MLC. At the outset, it should be noted that there are examples of EU legislation where there are no specific exclusions or derogations or separate sectoral arrangements applying to maritime workers (European Commission 2007: 4). EU Directive 91/533/EEC, concerning the right of employees to basic information about the contents of their contract of employment,[19] for example, provides a right consistent with Title 2 of the MLC.

Turning to the first title of the MLC, the sectoral Framework Agreement between the social partners states that no person under sixteen years of age shall work on a ship and that no seafarer under eighteen years of age shall work at night.[20] This partially removes the derogations from general Directive 94/33/EC on young workers that had existed for seafarers.[21] The rules governing recruitment and placement services fall within the competence of the member states subject to a co-ordinating role performed by the European Commission. Title 1 obligations would fall on member states both in compliance with existing ILO obligations and, to the extent that further steps are necessary, protection for seafarers should be addressed as part of ratification of the MLC. Moreover, there is a general right in the EU to access to placement services under Article 29 of the Charter of Fundamental Rights of the EU.

The second title of the MLC is concerned primarily with terms of employment such as wages, working hours of seafarers and annual leave. The MLC does not establish or require a minimum wage, but does require that seafarers be paid regularly, in full and in accordance with the seafarers' employment agreement and any applicable collective agreement. Guidance (in Part B) is also provided in the case of countries that adopt laws or regulations governing seafarers' wages. Regulation of 'pay' by EU Directive, Regulation or Decision under Treaty provisions on social policy is excluded from EU competence by Article 137(5) of the EC Treaty. The obligation to comply with these minimum standards therefore falls wholly on the member states and, in the absence of any express competence to establish an EU-wide minimum wage for seafarers, there is considerable scope for social dumping.

For most workers in the EU, the rules concerning hours of work are laid down in the Directive on the organization of working time.[22] All workers, including seafarers, are entitled to more paid annual leave than required by Title 2. Shortly after the period required for implementing the Working Time Directive into national law, ILO Convention No. 180 concerning Seafarers' Hours of Work and the Manning of Ships was adopted, from which the second title of the MLC is essentially derived. The adoption of the Convention presented a unique opportunity for the EU to demonstrate its ability to give effect to ILO standards by introducing sector-specific directives to incorporate the Convention into EU law in conjunction with the social partners in the maritime sector.

The first measure, Directive 1999/63, 'concerning the agreement on the organisation of working time of seafarers',[23] provides a model for a social policy

agreement, specific to seafarers, brought into legal effect under Article 139 of the EC Treaty, which allows for the implementation of such agreements by means of a binding directive. The European Agreement on the organization of working time of seafarers was concluded in September 1998 between EU ship owners and transport workers' unions, and is annexed to the Directive which gives it full legal effect. The provisions in the Convention are faithfully reflected in the Agreement. Therefore, to the extent to which flexibility is permitted, the Agreement is consistent with the requirements in the MLC for substantial equivalence. The second measure, Directive 1999/95/EC, 'concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports',[24] contains detailed rules on seafarers' hours of work on board ships calling at EU ports and is best understood as putting into effect the enforcement requirements of Convention No. 180 and, therefore, it must now be seen as an effective contribution towards the broader compliance obligations in Title 5 of the MLC. Significantly, it contains a general clause, now also featured in the MLC, that ships flying the flag of a state that is not a party to the Convention should not receive more favourable treatment than those flying the flag of a state that is a party to it.

The third title of the MLC concerning conditions on board ship is not directly replicated in EU law but it is met, in part, by Directive 2001/106/EC concerning enforcement by port state control of international standards (in respect of shipping using EU ports and sailing in waters under the jurisdiction of member states).[25] This measure will have to be adapted to bring it fully into line with obligations under Title 3 (European Commission 2007: 7). However, the requirements in the third title must be read alongside specific provisions on health protection in the fourth title that fall within the general ambit of EU health and safety law, which applies to 'all sectors of economic activity, both public and private' (Article 2.1 of Council Directive 89/391/EEC, the 'framework' health and safety directive[26]). Under Article 5(1) of the EU's 'framework' directive on health and safety, employers, including ship owners, have a duty to ensure the safety and health of workers 'in every aspect related to the work'. This duty is to be fulfilled by taking the necessary measurers, including the prevention of occupational risks. Employers have an obligation to provide a system of risk assessment designed to avoid risks, evaluate them and combat them at source. According to the European Commission, out of twenty-eight EU directives governing the field of health and safety at work, only two do not apply to the maritime sector (European Commission 2007: 8).[27] Moreover, two health and safety directives are specific to the maritime sector: Council Directive 92/29/EEC on minimum safety and health requirements for improved medical treatment on board vessels;[28] and Council Directive 93/103/EEC concerning minimum safety and health requirements for work on board fishing vessels.[29]

Viewing EU legislation on health and safety protection as a whole, one can conclude that it provides comprehensive protection for seafarers at or beyond the requirements of Titles 3 and 4 providing that it is adequately enforced by the member states. There is scope for further measures to be adopted specific to the maritime sector based on agreement by the social partners, following the model used for the

agreement on working time. The inclusion of health and safety and working conditions provisions in such an agreement could also contribute to better application and enforcement in combination with flag state and port state control.

Social security levels in the EU are determined exclusively by the member states who have primary responsibility for guaranteeing the standards set in the fourth title. However, EU legislation provides, by means of rules concerning co-ordination of social security, that workers and their family members are protected when moving within the EU by the principles of equal treatment under national schemes.[30] In practice, this is of particular importance to seafarers who are the most mobile of EU workers and, as they are often low paid and experience gaps between periods of employment, have to rely on social security protection. The EU's acceptance of its exclusive competence over social security co-ordination rules, as a basis for authorizing the ratification of the MLC, is therefore of particular importance in this context. In terms of substance, complementary social security protection, based on the employment relationship, is an important issue in the maritime sector, and this could also give scope for EU social partner initiatives.

The fifth title of the MLC on compliance and enforcement builds, to a certain extent, on recent practice in the EU, which emphasizes that, even, or perhaps especially, where the content of social or labour legislation is strong, its effectiveness depends on regular oversight and accessible enforcement mechanisms. In this regard, the decision of the ILO to introduce an action plan to achieve widespread ratification and effective implementation of the MLC is consistent with the approach of the EU towards the monitoring of its own social laws.[31] EU instruments, both regulations, which apply directly into national law, and directives, which are result orientated from the date of implementation into national law, create an imperative on the member states to ensure the fulfillment of their EU obligations. In order to more effectively realize these objectives, recent social legislation has contained stronger provisions concerning enforcement and compliance. Such compliance and enforcement clauses are now standard in new or consolidated measures of EU social law and are subject to the oversight of the European Court of Justice. It is an approach that is fully consistent with Title 5 of the MLC and the requirements of the Action Plan.

The EU's role in the follow-up: a two-pronged approach

The ILO's efforts to encourage ratification of the MLC have received significant support from EU institutions. During the discussion in the closing session of the Maritime Session of the ILC, the Commission representative confirmed that it would 'do everything it can' to speed up and encourage ratification (ILO 2006). While the responsibility for application and ratification lies primarily with the EU member states, the Commission indicated that it would also present EU initiatives as 'the European Union as such can bring value added to the effective application of the convention with its own legal instruments'. Emphasizing that 39 per cent of the world's ships pass through European ports at some time, he stressed that Europe 'has powerful tools at its disposal, which can be used to improve

governance worldwide'. In this context, the Commission was 'considering the idea of integrating this Convention into European law' through consultations with the EU social partners, possibly resulting in an EU framework agreement implemented through a Council Decision on the basis of Articles 138–39 of the Treaty establishing the European Community (TEC).

The Commission acted swiftly following the adoption of the MLC in February 2006. The European Commission's Communication on the strengthening of maritime labour standards was issued in June 2006 (European Commission 2006b) and proposed a two-pronged approach in the wake of the adoption of the MLC. This approach was designed, first, to encourage and expedite ratification of the Convention by its member states and, second, following consultation with the social partners, to take action under the social provisions of the European Community (EC) Treaty to improve legal protection for seafarers in the EU in order to guarantee conformity with the MLC's minimum standards. The Commission proposed leaving open the possibility of adopting more favourable provisions at EU level or even making the guidelines in Part B of the Convention legally binding (European Commission 2006b: 6–7).

In relation to the first prong, the Council of the EU – acting as a collective of twenty-seven member states – unanimously adopted a decision in June 2007 authorizing member states to ratify the MLC (Council Decision 2007/431/EC).[32] The initial Commission proposal, supported by the European Parliament,[33] had stated that member states had to ratify before the end of 2008. On the basis of opposition to a deadline by some member states, the final Council Decision adopted on 7 June 2007 was a compromise: member states should 'make efforts' to ratify by the end of 2010.

The Council's decision aimed to give a 'clear signal' of the importance the EU attaches to the MLC. Moreover, the adoption of a binding decision under Article 249 of the EC Treaty, rather than a soft recommendation, creates an obligation on member states under EU law to 'make efforts' to ratify before the end of 2010. If fulfilled, this would be significant because the EU and the European Economic Area (EEA)[34] together account for twenty-nine of the necessary thirty states required for entry into force of the MLC and at least 28 per cent of the world's fleet, creating a 'motor effect' to expedite ratification (European Commission 2006b: 6). Although the EU cannot ratify the MLC in its own right, it is obliged to require ratification by its member states because it has exclusive competence over the co-ordination of national social security schemes, contained in the fourth title of the MLC, and shared competence with the member states over the bulk of the remaining mandatory provisions (European Commission 2006b: 2–3). Hence, while the decision does not carry any sanctions for non-compliant member states, it creates an imperative for national ratification independent of any harmonizing steps to enhance EU minimum standards.

In parallel with the ongoing ratification process at national level, the second prong of action requires a thorough reassessment of the EU's regulatory framework of social protection for seafarers and, to this end, the European Commission embarked upon the first phase of consultation with the social partners as required

by Article 138(2) of the EC Treaty.[35] In May 2008, a framework agreement incorporating certain provisions of the MLC was reached by the EU social partners, jointly requesting the Commission to present a proposal for a Decision to the Council with a view to implementing the agreement.

At the same time, the MLC coincided with a renewed interest in EU maritime policy in general, including social laws that do not touch directly on its provisions.[36] The MLC preparatory process contributed to a renewed constructive co-operation,[37] in combination with the inclusion of decent work and international labour standards in various EU external policies, such as the European Consensus on Development (EU 2006).[38] The 2006 Commission Green Paper on the future of EU maritime policy highlighted the importance of human resources and called for speedy ratification and application of the MLC. One initiative accompanying the resulting 2007 EU blue book was the launch of a consultation process with a view to revising a number of exclusions for the maritime sector in EU social legislation. Since 1975, a number of EU Directives in the social policy field systematically excluded the maritime sector, often as the result of a compromise in Council.

In its analysis of social laws applying to the maritime sector, the Commission refers to two groups or typologies of differentiation in directives (European Commission 2007: 5). The first group allows for the possibility that member states may introduce exclusions applying to seafarers when implementing them. For example, the Insolvency Directive 2002/74/EC[39] allows for certain categories of employees to be excluded where adequate protection is available elsewhere, which may be applied to seafarers, and expressly excludes 'share-fishermen'. Only six member states have excluded seafarers or share-fishermen and, given the vulnerability of the maritime sector to insolvencies, there is a strong case for full equality to ensure that workers who lose their jobs receive a basic compensatory payment.

In the second group, those in which seafarers are excluded from the scope of application, the most notable are the directives on collective redundancies and transfers of undertakings. The Collective Redundancies Directive 98/59/EC[40] creates an obligation on medium-sized and larger employers to inform and consult their employees about impending redundancies in order to reduce or mitigate their effects. The Transfers of Undertakings Directive 2001/23/EC[41] provides for protection of employees' terms and conditions on the change of employer. If the EU is genuinely committed to the right of all seafarers to decent employment (MLC, Article 1(1)) and a genuine level playing field in the maritime industry, it must review these exclusions and take steps to eradicate them as soon as possible, not least because they are not applied in many of the member states and their original rationale, dating back to the 1970s, is no longer apparent (European Commission 2007: 6–7).

Our survey has shown that, in most respects, EU law meets or, in the area of health and safety, even exceeds the mandatory standards contained in the MLC, but the legislation forms somewhat of a patchwork quilt. The retention of exceptions in a whole swathe of social legislation no longer fits with the international

requirement for decent treatment of seafarers. The consultation exercise involving the social partners in the EU, which will result from the MLC, offers the opportunity to integrate the standards in the MLC within EU law in a systematic fashion that ensures, as far as possible, the removal of exceptions that can no longer be justified.

Conclusion: in search of a global level playing field

The MLC provides an interesting insight into the way in which the EU can contribute to the legal regulation of the social dimension of globalization. The maritime industry is truly global and suffers from many of the potentially harmful social effects on its workers that this causes. The MLC itself is a global response to labour standards, as well as being a global consensus among international social partners. Even a cursory analysis of the way in which the convention was adopted and is now being ratified shows that the EU has taken a key position in this process.

The EU has been involved at many levels: it has provided financial assistance to the ILO, by co-funding the ILC; it co-ordinated the viewpoints of its member states during the amendment and adoption process, allowing for a concerted 'European' stance to be taken; it has provided the political will to support the convention, with the Commission encouraging ratification by its members; and it has taken this a step further in moving towards the introduction of European law incorporating the convention, through consensus between the social partners.

This is obviously key to the success of the MLC, as Europe is an important collection of flag states and port states, as well as a source of labour supply. Many of the world's great global sea journeys involve a European starting point or destination. The Union has clearly contributed to the success for the ILO that the MLC is generally accepted as being. Conversely, the MLC has been a success for the EU: it has, by becoming integral to this project, shown itself not only to be the lead regional organization in the area, but also to have a unique relationship with the ILO. By advancing the common interest, it has advanced its own self-interest – or, perhaps, by advancing its own self-interest, it has advanced the common interest as a side effect.

If the analysis in this paper confirms that the EU has been extremely active in its involvement in the MLC process, this is despite current EU law substantially existing at an equivalent, and sometimes even higher, level to the standards contained in the MLC. This suggests that the impact of the MLC on substantive EU law is likely to be low. In that context, it is possible that an explanation of why the EU was so actively involved in the drafting stage of the MLC and its eventual adoption was to ensure that the EU's norms in this area were projected onto the resulting convention, and to avoid the adoption of an ILO convention that was inconsistent with EU law. In this way, the EU will gain the full effect of what is hoped to be the positive result of the MLC in creating a global level playing field, by ensuring that all flag states offer the same social and labour protections to seafarers employed on ships registered in their countries.

However, it is not surprising that the EU's involvement in the MLC process should be partially based on self-interest; the ILO intends for member states to ratify and implement the MLC on the basis of their own self-interest, by ensuring that countries that do not ratify will be at a disadvantage. It is implicit that the EU's two-pronged strategy of uniform ratification of the MLC and reassessment of its regulation of the social and labour rights of seafarers is intended to guarantee a level playing field between member states (as well as in relation to states outside the Union) by removing the incentive for ship owners to switch national flags solely for the purpose of taking an unfair competitive advantage from lower labour standards applicable to seafarers in another member state. EU interests are met by a global standard that requires levels of social and labour protection from other flag states that come close to those that already exist in the EU. This is not necessarily contrary to ILO objectives, as the European standards in this area were perhaps a global high point, and a co-ordinated European position assisted in achieving results that are positive from a global perspective.

On the other hand, it is clear that this does not entirely explain the EU's significant involvement. It seems that a variety of other reasons intervene here. First, there are a series of changes within the EU that have contributed to this. These include a gradual evolution from the EU being an internal market to a global player against the background of EU enlargement and increasing globalization, and the EU's support for the strengthening of multilateralism and global governance. As such, it is increasingly active in the UN, in its specialized agencies such as the ILO and in other fora such as the G8. The EU's leading role in the preparation and negotiation of the MLC must be understood as part of its wider policy to 'assert its identity on the international scene' (Article 2 of the Treaty on European Union) and to shape the social dimension of globalization in a fashion that is consistent with its 'common values' (see also Chapter 1).[42]

Second, the ILO has, for a variety of reasons, become an increasingly important international organization. This is exemplified by the way in which the concept of the social dimension of globalization has become one of the factors that has inspired action at the international level since the publication of the World Commission on the Social Dimension of Globalization's report. In relation to the EU, this has combined with the fact that, in many ways, the ILO's current phrasing of its priorities, the decent work initiative, echoes the EU's Lisbon Strategy by mixing economic and social imperatives in an integrated approach.[43] Interestingly, much of the justification for the MLC has focused not only on the way in which it aims to improve matters for seafarers, but also on the way in which it is beneficial for ship owners. The Director General has clearly stated that the MLC provides:

> a necessary balance between labour standards and regulations needed in the sector with the promotion of productivity and competitiveness. Such a balance is essential today across the globalized world. It is not an 'either/or'

proposition, but one that provides both fairness and efficiency in a diverse and changing sector.

Director General's Statement (2006: 2)

The MLC matched the interests of all constituent social partners – seafarers and ship owners were as much in support as member state governments and EU institutions. There is, arguably, a growing political convergence between the EU and the ILO on the basis of shared principles such as the combination of economic competitiveness and social justice.

This suggests that the EU has a great ability to act with the ILO in relation to the social dimension of globalization. The ILO is the lead international organization in this sphere, having successfully defined the social dimension of globalization to primarily relate to labour and social security concerns. The MLC is an example of the ILO taking the topic to the heart of the organization's work: its conventions and recommendations. The ILO has taken advantage of its traditional strength of international tripartite involvement in decision-making to create a new process for reaching global consensus. While the organization's claims as to the significance of this Convention are perhaps overstated,[44] it is clear that this is an example of the way in which the ILO is attempting to define itself in the current era. The ILO has chosen to position the MLC as a showpiece in its actions to promote decent work in a globalized world. The EU has chosen to support this ILO activity with much the same rhetoric.

Notes

1 The authors wish to thank Cleopatra Doumbia-Henry and Jan Orbie for useful comments on earlier versions of this chapter.
2 Director, ILO Brussels office for the EU and the Benelux countries; previously administrator at the European Commission, DG Employment, Social Affairs and Equal Opportunities; the views expressed in this contribution do not necessarily reflect the official position of the European Commission.
3 At over 100 pages, it is the longest ever ILO convention.
4 While the maritime industry is the only sector in the ILO that functions on the basis of a specific session of the ILC, the general session of the ILC has adopted a number of conventions for specific sectors such as the fishing sector (June 2007) and health and safety in mining or agriculture.
5 The decent work deficit on board many ships has a direct negative impact on safety. Following a number of environmental disasters with large oil tankers, the EU has taken legislative action to impose safety standards for the construction of vessels and to increase port state control.
6 This was the 94th (Maritime) Session of the ILC.
7 The exceptions are Convention No. 185 on seafarers' identity cards and Convention No. 71 on seafarers' pensions.
8 The EU insisted on this very broad coverage in order to avoid unjustified exclusions that could negatively affect the global level playing field.
9 A member that is not in a position to implement the rights and principles in the manner set out in Part A of the Code may, unless expressly provided otherwise in the MLC, implement Part A through provisions in its laws and regulations or other measures that are substantially equivalent to the provisions of Part A (Art. VI, 3). Art. VI, 4 establishes the conditions for the application of this concept.

10 In the case of an objection, the member state's proposed amendment will be referred back to the tripartite committee.
11 Ratification: 7 June 2006; second largest flag state (by gross tonnage).
12 Ratification: 25 September 2007.
13 Ratification: 11 February 2008.
14 The annex to the Commission proposal for a Council Decision included sixty-five EC legislative texts that could be directly or indirectly affected.
15 For example, EU member states made comments as a bloc and referred to 'European standards': see Report of the Committee of the Whole 7(1) (ILO 2006).
16 The EC social dialogue and industrial relations budget, including the grant allocated in 2005 to the ILO is available at http://ec.europa.eu/employment_social/calls/results/2005/vp_2005_002_en.pdf (accessed 24 March 2008).
17 Mr Barrot, at the ninth, closing, sitting of the ILC (ILO 2006).
18 Case C-438/05 *ITF and the Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti* (11 December 2007, unreported).
19 Directive 91/533/EEC of 14 October 1991, OJ L 288/32.
20 Implemented through Council Directive 1999/63/EC of 21 June 1991, OJ L 167/33.
21 Directive 94/33/EC of 22 June 1994, OJ L 216/2.
22 Directive 2003/88/EC of 4 November 2003, OJ L 299/9, consolidating earlier texts.
23 Directive 1999/63 of 21 June 1999, OJ L 167/33.
24 Directive 1999/95/EC of 13 December 1999, OJ L 14/29.
25 Directive 2001/106/EC of 19 December 2001, OJ L 19/17.
26 Directive 89/391/EEC of 12 June 1989, OJ L 183/1.
27 The Directives referred to are: (1) Council Directive 89/654/EEC of 30 November 1989, OJ L 393/1, concerning minimum health and safety requirements for the workplace – the 'workplace' for the purpose of this directive does not include workplaces inside means of transport or fishing boats and require special regulation; (2) Council Directive 90/270/EEC of 29 May 1990, OC L 156/14, on the minimum health and safety requirements for work with display screen equipment.
28 Directive 92/29/EEC of 31 March 1992, OJ L 113/19.
29 Directive 93/103/EEC of 23 November 1993, OJ L 307/1.
30 Based on the principles laid down in Articles 39–42 of the EC Treaty. See also European Commission (2007: 10).
31 See, for example, the EU's action programme to combat discrimination complementing the anti-discrimination directives: Council Decision 2000/750/EC of 27 November 2000, OJ L 303/23.
32 Council Decision 2007/431/EC of 7 June 2007, OJ L 161/63.
33 Report presented by MEP M.L. McDonald, PE 378.766.
34 Norway and Iceland, although not EU member states, are bound by the free movement and social provisions of the EC Treaty by the 1991 European Economic Area Agreement.
35 See European Commission (2007). Note that a precedent for this existed as European social partners had concluded such an agreement in 1998 on the working time of seafarers based on ILO Convention No. 180, implemented by Council Directive 1999/63 EC (see above) and complemented by Directive 1999/95 of 13 December 1999, OJ L 014.
36 The EU's recent interest in the maritime sector is partly due to a stronger co-operation between maritime, transport, employment and social affairs departments in both EU institutions and its member states. On 2 July 2008, as part of the renewed EU social agenda package, the commission presented a proposal for a Council Directive implementing the EU maritime framework agreement.
37 The European Commission's Directorate General for Employment, Social Affairs and Equal Opportunities and Directorate General for Transport and Energy co-operated

throughout the MLC process, including at the launch of the Commission proposal authorizing ratification and social partner consultation.

38 It will be interesting to see whether the maritime sector will be taken up by EU development co-operation and external assistance: external assistance has tended to focus on sectors involving the most people. Maritime issues are unlikely to be included in large development initiatives unless they are explicitly included in requests by third countries for EC and EU member states' assistance.

39 Directive 2002/74/EC of 23 September 2002, OJ L 270/10.

40 Directive 98/59/EC of 20 July 1998, OJ L 225/16.

41 Directive 2001/23/EC of 12 March 2001, OJ L 82/16.

42 See European Commission (2004, 2006a); European Council (2007).

43 The European Social Agenda of February 2005 (European Commission 2005) includes, among other things, the goal of decent work for all. The EU's Lisbon Strategy of hand-in-hand promotion of economic competitiveness, employment and social cohesion is in line with many of the recommendations of the 2004 World Commission on the Social Dimension of Globalization and with the decent work agenda. The new third cycle of the EU Lisbon Strategy, as endorsed by the European Council of December 2007, also highlights its external dimension.

44 It is not clear whether this approach can easily be extended to other issues: the MLC relies on credible enforcement through both flag state and port state control, which will be irrelevant for other sectors; further, the MLC relies on close co-operation between international, regional and national organizations of ship owners and seafarers, and co-operation at a cross-industry level could be expected to be significantly more complex.

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8 The EU and the health dimension of globalization

Playing the World Health Organization card

Sébastien Guigner

According to the World Commission on the Social Dimension of Globalization, health should be given greater attention in the globalization process as it is a key goal of social development. Consequently, health, which is a vital element in everyday life worldwide, could contribute to legitimizing globalization (WCSDG 2004: 4–5, 107).

This refers to the positive link between globalization and health. However, until now, the negative link has been much more visible. Obviously, the process of globalization greatly affects health, creating new threats to it throughout the world, but particularly in poor countries. As the result of market interconnectivity, globalization contributes to increasing the pressure on the economics of health systems – health care delivery and social health insurances – thereby jeopardizing universal access to health care.

Owing to the merging process, new medical developments are concentrated in a small number of companies in such a way that the health of the populations in developing and poor countries has become highly dependent on the goodwill of multinational companies. Many poor and developing countries have to deal with an exodus of medical staff as their health professionals are moving to richer countries where there is a lack of such skills and where the salaries and living conditions are better. More visibly, as a result of increased flows, globalization increases the probability of disease and the spread of health problems. Greater movement of people and fewer controls at borders automatically make pandemics increasingly difficult to avoid. In fact, these risks can arise from international trade in certain products (e.g. the mad cow/bovine spongiform encephalopathy (BSE) crisis) and/or from movements of both humans and animals (e.g. acquired immunodeficiency syndrome (AIDS)/human immunodeficiency virus (HIV), severe acute respiratory syndrome (SARS) and avian flu/H5N1 epidemics).

Globalization not only favours pandemics – e.g. global epidemics – linked to infectious diseases; it also leads to the spread of habits related to consumption that engender health risks. Undeniably,

> the increased penetration, as a result of economic globalisation of 'obesogenic' (e.g. processed, high fat, high sugar, high salt) diets and increased

> sedentariness and the spread of global 'bads' (e.g. tobacco, alcohol and habit-forming drugs) largely explain the rise of non-communicable diseases … in poor communities.
>
> Kickbusch and Lister (2006: 16)

But health also impacts on globalization and on the global political order. Indeed, infectious diseases worldwide can impede economic international exchanges.[1] More fundamentally, as one of the major economic sectors in industrialized countries (Suhrcke *et al*. 2005) as well as a major component of their social models, and as the number one need of men and women everywhere, health can be at the origin of political crises (Fassin 1996). Health is vital for any government or state. The power of states relies on their citizens' health, be it their ability to make war or to produce goods. Moreover, bad health can lead to state failure and can 'provide the ground for terrorism or mass migration and thus create long-term global security problems' (Wiechoczek 2006: 2). As health is a key factor in economic growth, development and social and political stability, 'public health represents a possible tool of domination' (Dixneuf 2003: 217).

Therefore, there are many generous and self-interested motives for European countries, and for the EU, to promote consideration of the health dimension of globalization on the countries and regions external to it, and to play an active role in global health. In this respect, on 6 April 2001, David Byrne, the former European Commissioner for Health and Consumer Protection, made the following declaration at the World Health Organization (WHO): 'I am very pleased that the European Commission and the WHO recently agreed an exchange of letters to strengthen our working relationships and to move the health agenda forward in all corners of the world'.[2]

Indeed, among other strategies, in order to become a player in world health politics, the EU has made 'the choice of multilateralism', to quote the title of a European Commission (2003) communication. Multilateralism is frequently associated with notions of normative/civilizing power (Sjursen 2006). Without taking sides in the debate concerning these notions, two core features, often characterizing both multilateralism and normative power, can be distinguished. First, they are often attached to vague ideas of idealism, honourable goals, universal goodness, etc. (Manners 2006). The proponents of normative power and multilateralism would be 'a force for goodness in international society', to employ the wording of Jørgensen and Laatikainen (2004: 15). Second, normative power is a matter of diffusing ideas and attracting capacity rather than constraining capacity. Power is exercised 'softly' in a law-based international order. As a result, the WHO – the leading United Nations (UN) organization on health issues[3] and one of the main UN organizations committed to promoting health goals in the globalization process (WCSDG 2004) – is a place the EU must penetrate in order to be a player in the health dimension of globalization.

It appears that the December 2000 exchange of letters referred to by the European Commissioner has been duly implemented. For instance, on 16 June 2003, David Byrne received a special award made by Dr Gro Harlem Brundtland,

the former WHO Director General, for leadership in global tobacco control. On 22 October 2004, the WHO announced that, as soon as his mandate as Commissioner ended, David Byrne would become the WHO special envoy concerning the revision of the WHO International Health Regulations (IHR), charged with building political consensus for the revised IHR. In short, the EU and WHO seem to stand 'shoulder to shoulder'.[4] According to the European Commission, the EU–WHO relationship is a prime example of the EU's ambition to strengthen its normative power through effective multilateralism.[5] This resembles the European discourse as regards the strengthened ties with the International Labour Organization (ILO) from 2001 onwards (see Chapter 1).

The aim of this chapter is to provide a second look at this official 'fairy tale'. Are EU–WHO relationships really idealistic? How do they occur? To what extent and how does the EU promote health goals externally? Is the EU coherent and consistent in doing so? While all these questions will be tackled, the underlying and most important point of this chapter is to assess the EU's role in the health/social dimension of globalization through international organizations – in this case, through the WHO.

To offer a wide-ranging picture of this, the chapter is divided in two parts. The first is devoted to the day-to-day, e.g. recurring/stable, relationships between the EU and the WHO. Here, the EU's observer status towards the WHO and its consequences, which limit the Union's ability to influence WHO decisions directly, are emphasized. Then, the frequent interactions between WHO and EU officials will be presented, leading to the supposition that a socialization process is probably taking place. Such a process could help the EU to exert normative power through the WHO and to influence the globalization process. Thus, as in the context of the ILO, the shortcomings stemming from the EU's observer status are partly downplayed by its effectiveness in day-to-day decision-making (see Chapter 5).

The second part of the chapter is dedicated to what could be called 'grand bargain relationships', e.g. treaty negotiations, which are of course more exceptional and singular than day-to-day relationships. The focus will be on a case study, the Framework Convention on Tobacco Control (FCTC) – a unique example of a 'hard' instrument aiming to promote health at a global level – in which the EU was a leader, according to EU and WHO officials. The EU's strategy and strengths in being influential in the negotiation process will be explained, and its fragile power in international grand bargaining, linked to its ability to speak with one voice, will be demonstrated. Here, internal politics, policies and competence, as well as the EU's organization in international negotiations, play a big part. It will also be shown that this power is not committed to promoting goodness universally, but first and foremost to promoting the *acquis communautaire* which can be inconsistent with promoting health goals internationally (cf. Chapters 2 and 3).

Day-to-day relationships: the EU and the WHO

About ten years ago, Reiner (1999) asked if the EU and the WHO would stand united. Since the end of the 1990s and the increase in the EU's internal activities

in matters of public health, it is impossible to deny that the two organizations have set up extensive and intensive routine collaborations. However, the EU seems less able to influence the social/health globalization process through WHO political decisions than through its technical decisions.[6] Actually, the observer status of the EU in political configuration does not often allow it to speak with one coherent and audible voice (see also Chapter 5 on EU observer status in the ILO). On the contrary, in technical configurations, the EU's role seems not to be limited to its presence, although it is closer to actorness. Moreover, in this situation, the EU and the WHO might be involved in social learning processes that could favour the dissemination of the values, ideas and interests of the former and help it exert its influence abroad and promote the health dimension of globalization better than global political decisions concerning health.

The EU within the WHO: shortcomings of the observer status

The EU and the WHO have been related for decades. The collaboration between the European Commission and the WHO was based on exchanges of letters in 1972 and 1982. These first exchanges of letters had few concrete consequences. According to officials within these two organizations, co-operation was limited to sporadic actions without common strategy and focused on an exchange of information on the activities set in motion by the two organizations to avoid overlaps. In fact, at that time WHO–EU relations were, in the pure logic of bureaucratic politics, conflicting and competitive (Guigner 2006). This resembles the tensions between the global social standards of the ILO and the EU's regional policies – at least before 2000 (see Chapter 5). Following member state recriminations, the enlargement of EU health competences in the Amsterdam Treaty and the appointment of the new WHO Director General, there was a further exchange of letters on 14 December 2000 identifying common priority areas and outlining practical procedures for co-operation.[7] Equally, it has been argued that the relationship between the EU and the ILO has intensified since the beginning of this millennium, including an exchange of letters between the European Commission and the ILO secretariat (see Chapter 1).

This framework was designed to consolidate and intensify the collaboration established with earlier agreements. As a consequence, the Directorate General for Health and Consumer Protection (DG Sanco) was designated *chef de file* for EU–WHO collaboration, although all the DGs involved in health-related fields co-operate regularly with the WHO. The exchange of letters also outlines practical procedures in co-operation. For example, it makes plans for relations between the European Commission and the World Health Assembly (WHA) and between the European Commission and the Executive Board (EB) of the WHO.[8] It is stipulated in particular that the Commission will be invited to participate as an observer at WHA, EB and Regional Committees' meetings; that the Commission will be provided with WHA, EB and Regional Committees' reports, and with the reports submitted by the Director General to these bodies; it allows the Commission to submit memoranda to the Director General, who shall determine the need and scope of their circulation; it is also set up so that the WHO Director General

draws the attention of WHO bodies to the Commission's participation in their work, notably concerning the negotiation of international agreements.

However, the Commission's officials deplore the fact that the observer status limits the EU's capacity to influence WHA and EB decisions directly.[9] According to WHA procedures, the EU representatives may participate, but cannot vote, in WHA deliberations and those of its principal committees. If invited, Commission officials may also attend and participate, without voting, in the deliberations of the subcommittees and other subdivisions. The same rules apply to the Commission's participation in EB meetings as well as in meetings of the WHO Regional Office for Europe.[10] The rules that apply to the EU are the same as those that apply to international organizations and non-governmental organizations (NGOs). This means that, when the Commission – representing the EU – wishes to take the floor, the WHO secretariat must previously have been provided with a written note, and it can only take the floor after all WHO member states have spoken, and sometimes only after other international organizations of varying importance. The effect of this is that European Commission interventions are limited in number and can rarely be made at key points during a debate. The observer status also has practical implications, which are more important than they appear at first sight. Among these are that, in many cases, no nameplate is provided for the EU. In addition, the colour of badges provided for the Commission, when they exist, is different from those of the member states. Moreover, the Commission delegation sits at the back of the room together with the UN agencies and international organizations.

All this greatly reduces the EU's influence and visibility, particularly as regards third countries that are not familiar with the EU. As a consequence, third countries are reluctant to accept the Commission as an equal partner, particularly within the context of various drafting groups that are 'normally' reserved for WHO member states.[11] Given the difficulties in intervening in the plenaries and in the working groups, the position of the EU is mainly taken into account through EU member states. However, according to the European Commission, EU co-ordination is often loose. EU member states are sometimes reluctant to follow lines agreed within the Council or to keep the Commission informed of negotiations between EU member states and third countries taking place in the lobbies. This is mainly because some EU member state delegations to WHO meetings are not sufficiently familiar with the EU system. Another reason is that some EU member states do not acknowledge the Union's role in global health, and sometimes even its role in health internally.

To sum up, as in the case of the ILO, the observer status seriously limits the EU's negotiating powers, although it can make use of other channels to influence the WHO, and through it the health dimension of globalization. Indeed, most of the co-operation between the WHO and the EU does not take place in the form of 'high politics' directly involving member states.

The EU with the WHO: from co-operation to socialization

The Union and the WHO, and their respective officials, are involved in common activities, at both the EU and the global level, in various areas, including

infectious diseases, tobacco control, environment and health, health research, sexual and reproductive health, etc. In fact, they cover almost all health-related fields. Two fields of co-operation directly aimed at controlling the global dimension of health are those that deal with infectious diseases: avian influenza and poverty-related diseases (PRD), e.g. HIV/AIDS, malaria and tuberculosis. Indeed, the EU and the WHO have collaborated intensely in fighting avian influenza – which could become a pandemic if the virus H5N1 mutates to humans, which is plausible – leading to 'an example of successful EU–WHO co-operation' (Wiechoczek 2006: 45). For instance, to improve co-ordination of national policy responses in the event of an outbreak, the European Commission has issued several Communications on which the WHO has been consulted. Member states have also been asked by the Commission to follow WHO recommendations on drug stockpiling and vaccination and to draw up national plans in preparation for an influenza pandemic. To help with this, workshops were organized in 2005 in Copenhagen – the European headquarters of WHO – and in Luxembourg – where the European Commission's DG Sanco is based – involving all the member states of WHO-Europe. Most of these measures are internal, e.g. intra-EU, or confined to the EU's close neighbourhood, although to counter the epidemiological risks, a global approach must be taken, and measures must be adopted at the root of the epidemic and in countries that do not have the capacity to repel it.

The EU, in co-operation with the WHO, has engaged in actions along these lines but they remain sporadic,[12] contrary to Union action on PRD. Indeed, as the EU has more or less contained the epidemics within its member states, several European Commission DGs – Research, Development, External Relations, etc. – have developed a large variety of actions to combat these diseases at the external level. Among these wide-ranging activities involving the EU in this field on a global scale (Wiechoczek 2006), other instruments are developed in close collaboration with the WHO – sometimes through participation in other organizations such as the Global Fund to Fight AIDS, Tuberculosis and Malaria or the UNAIDS (the Joint United Nations Programme on AIDS/HIV). The European and Developing Countries Clinical Trials Partnership (EDCTP), which aims to develop clinical trials and research on new vaccines in developing countries, particularly in sub-Saharan Africa, is one example of EU–WHO co-operation at a global level. Indeed, the WHO is a crucial actor on the partnership board in charge of the strategic planning of this project – part of the EU's Sixth Framework Programme for Research – launched following an initiative from the European Commission.

Besides the myriad of specific projects that involve both the Union and the WHO, following the exchanges of letters mentioned above, formal co-operation mechanisms were set up symbolized by two institutional creations. First, DG Sanco appointed a special adviser for WHO work in 2003. Second, the WHO created an office in Brussels in 1999 designed to steer the co-operation between the two by helping to promote WHO policies, analysing the EU's health-related activities and developing co-operation in areas where the EU and the WHO have shared interests and objectives.[13] The formal mechanisms of co-operation include annual high-level meetings between WHO senior officials such as the WHO

Director General and the Commissioner and/or the Director responsible for public health in the Commission (DG Sanco), together with senior officials from other Commission services concerned with questions covered by the WHO – usually, DG Trade, DG Environment, DG Development and DG Research are represented. Again, a parallel can be drawn with the reinvigorated EU–ILO relationship in the same period (see Chapters 1 and 5). It is at these meetings that co-operation is given a political impulse. At a more technical level, meetings of senior officials are held with similar regularity.

To implement the decisions made during these meetings, numerous regular and *ad hoc* meetings are held between technical officials from the two organizations. Moreover, WHO staff take part in European Commission meetings and vice versa. For example, DG Research is represented as an observer on the WHO advisory committee on heath research, while the WHO is an observer at the Commission's FP7 research programme's steering committee on health-related matters. In addition to formal and informal day-to-day co-operation and meetings, the EU and the WHO have put in place staff secondment. Finally, the less visible but countless e-mails and telephone calls between officials at the two organizations s hould also be mentioned, as well as the more 'open' conferences organized by the European Commission, the WHO or any other institution where WHO and European Commission officials are present.

These intense EU–WHO – and especially EU–WHO-Europe – day-to-day relationships fulfil several constructivist conditions that favour social learning and make persuasion more likely (Risse 2000, Checkel 2001): political and technical environments are often uncertain;[14] small groups are involved; interactions take place in a relatively isolated way; agents have quite similar professional backgrounds; and, more decisively, there is a densely institutionalized network of interaction between officials on both sides. Moreover, and despite the implicit aspect of concurrence, there is no sign of competition between the officials involved in a deep socialization process. Consequently, the EU, via the European Commission, which now has real expertise in health issues (Guigner 2006), has indisputable facilities to influence WHO programmes or recommendations by persuasion and, by ricochet, to impact on health at a global level, too. But one question remains open: who influences whom (cf. Chapter 2 on the EU–ILO relationship)? Does the EU influence the WHO or vice versa?[15] Such a question is also valid for the health content of grand bargaining in which the EU is involved.

Grand bargain relationships: the EU and the tobacco case

Smoking is the largest avoidable cause of death and illness in the EU. Moreover, notwithstanding the social costs of death and disease, and the social gap generated by smoking, which undermines welfare and social stability,[16] the economic cost of tobacco use is extraordinarily high because of health care costs and the contribution by human capital to economic growth (Aspect Consortium 2004). In an effort to reduce the socio-economic tobacco burden, since the mid-1980s, the EU – like most industrialized countries – has developed a wide-ranging tobacco control

policy. One consequence of tobacco control policies implemented in industrialized countries has been to shift the problem to developing countries (WHO 2003). To guarantee its market, the tobacco industry is increasingly targeting those countries where tobacco control policy is weak or non-existent. Seventy per cent of deaths caused by tobacco occur in developing countries, and this percentage is expected to increase in future as a result of shifting the target.

The economic and social burden of tobacco is at least as important in developing countries as in developed ones as, in addition to actual tobacco consumption, poorer countries are devastated by the consequences associated with tobacco growing, such as child labour, specific diseases, deforestation and environmental health implications (WHO 2003). Although the harm tobacco use does to health and its economic and social implications are widely acknowledged, implementing tobacco control policies is not easy because the economic benefits derived from tobacco may offset its downsides. Owing to political (short-)term horizons, many governments, especially in developing countries, hesitate to support strong tobacco control. At the microeconomic level, farming and manufacturing jobs depend on tobacco consumption. On the macroeconomic side, tobacco is important for trade balance in those developing countries that are net exporters of tobacco products. Tobacco taxes also provide important revenues to governments.[17] On the other hand, higher income countries fear that this attitude will ruin their efforts to combat tobacco consumption, particularly because of the effects of contraband coming from developing countries.

To tackle this communicating vessels system in developing and harmonizing tobacco control at a global level, in 1998, the WHO proposed the first global public health treaty: the Framework Convention on Tobacco Control (FCTC). Negotiations began in 1999 under the remit of International Negotiating Bodies (INB). Six rounds of negotiations were held before the FCTC was adopted in May 2003. It is generally accepted that the EU has assumed a leadership role in the FCTC adoption process. Indeed, it will be shown below that the Union has significant powers in the UN's negotiating system when its constitutive parts stand united, especially if it can rely on a specific *acquis communautaire*, e.g. experience, offering the EU greater credibility and coherence. Yet, any break in the unity of the EU – breaks being favoured by weak internal competences – seriously harms its negotiating capacities and that of its constitutive units when they have delegated their power to the EU. However, the EU's negotiating capacity is not primarily directed at promoting the health dimension of globalization but at the promotion of the *acquis communautaire*, two goals that can be in competition.

The EU's technical and tactical leadership

Two non-public negotiating mandates were adopted by the Council in October 1999 and April 2001 to tackle the FCTC at EU level. They defined the objectives and the organization of the Union in negotiating the FCTC. It was laid down that the Commission co-ordinates member state positions plus those of the thirteen

accession and candidate countries in all areas covered by exclusive Community competence. It was also decided that the Commission takes the floor and negotiates on behalf of these states during the Geneva negotiations. Successive EU Presidencies co-ordinated member state positions in areas subject to shared or exclusive national sovereignty and took the floor on these issues during negotiations.[18] The basic principle of the Community position was that it should always be based on existing Community law, the *acquis communautaire*. Community positions were prepared by the Council's health working group, comprising member state representatives, members of the Commission, experts and sometimes NGOs.

Within this group, when consensus could not be achieved on any statement presented, either by the Commission on behalf of the Community or by the Presidency on behalf of member states, the issue in question was submitted to the Committee of Permanent Representatives (COREPER) and eventually to the Council. During the INBs, briefings were organized for the fifteen every morning and afternoon, before and after negotiating sessions, to analyse the situation and the strategy to be adopted.

All the issues dealt with at the WHO Convention had been extensively prepared to avoid interventions by any isolated member states and to achieve a common EU position. Indeed, it was assumed that a united position would put the Community in a stronger negotiating position in Geneva, as explained by a French Ministry of Health official:

> It is the system of the United Nations. One State, one voice. Vote is possible but in fact everything is decided by consensus after having been negotiated. We have more weight at 15 or 25 and more .... It creates an impression of mass, of an obstacle uneasy to break. More than if 25 countries agree together but do promote their opinion in an isolated way .... There is a logic of attraction, like in the laws of gravity.
>
> Interview, French Ministry of Health official, Paris (April 2006)

This logic was particularly important as the FCTC negotiations were organized by bloc. This means that, before having global discussions (before the INBs and the first day of each round), the negotiations took place within the different regional blocs (the six WHO regions), the aim being to deliver a regional consensual position. Then, plenary sessions were organized to identify the key issues. Here, specially elected presidencies of these regions took the floor on behalf of the members of the sessions. After that, the key issues were discussed in informal meetings and drafting groups, still structured by bloc as far as possible. Finally, the plenary assembly was reconvened to discuss the outcomes of the informal meetings and to decide on any outstanding issues.[19]

During this process, the EU's tactic, which can be referred to as a 'snowball strategy', aimed at increasing its gravity force by progressively adding groups of states to the coalition. The first step was to agree on a common EU position before rallying to this position the rest of the WHO European region that had also negotiated a common position in subregional meetings. Apparently, it was not difficult

for the Union to achieve this goal for four reasons: (1) WHO-Europe states that are not members of the EU do not have important vested interests in tobacco; (2) several states were EU candidates and thus had to implement the existing European law concerning tobacco control; (3) most of the states did not have legislation competing with the FCTC; and (4) non-EU states that are members of the WHO-Europe are dependent on the funding from this regional office which comes from EU member states. Therefore, it was quite easy for the EU to secure one-sixth of the total of WHO delegation votes.

In the next phase, the EU–WHO-Europe group tried to rally other blocs to the position of the European region. Once again, one of the most powerful arguments, if only implicit, was a financial one. Indeed, WHO European region member states, and especially EU member states, are among the most important contributors to the WHO's regular and non-ordinary budget, and were the most likely contributors to the future Convention of the Parties.[20] Only one other WHO region could have used such a strong argument: the PAHO (Regional Office for the Americas), but its position in the negotiations was often seriously attenuated because of its failure to find a consensus between its members who were defending opposing interests and values.[21] Moreover, the EU was in a strong position because it was a vital ally for those countries that wanted a strong FCTC – mainly members of the African and South East Asia WHO regions (AFRO and SEAR). Indeed, the FCTC would have made no sense if a majority of industrialized countries, 'responsible' for tobacco 'epidemics' because tobacco companies tend to be based there, did not sign and ratify it. Since the beginning of the FCTC process, EU countries seemed more likely to do so because they already had strong tobacco legislation. As a consequence, members of the AFRO and SEAR regions have often followed the EU line, even when they were not in complete agreement. The most important thing for them was to have support from industrialized countries. Hence, it was relatively easy for the EU to create a substantial coalition to weaken any opposite point of view.

Financial resources were not the EU's only argument in the negotiation process – credibility was important too. The Union's success in promoting strong health provision internationally was more likely when it could work its snowball strategy on experiences and norms already developed internally. Negotiations on Article 11 dealing with tobacco packaging provide a good example of EU leadership. An agreement on the labelling requirements was concluded just the day before the adoption of the Treaty. It used EU formulations proposed in the last two INBs. The inclusion of this important and strong provision in the Convention would not have been possible without the pre-existing European law in this area and the political leadership assumed by the EU. Actually, Article 11 of the FCTC is more or less a copy of the provisions of the EU's 2001 Directive concerning the manufacture, presentation and sale of tobacco products.[22] All sources, governmental and non-governmental, agree when explaining this success: the EU was a leader because it was the only one having introduced, and implemented, such legislation. It made the EU credible. It showed that it was technically and politically possible.[23]

From snowball to snowflake: diversity in unity

However, the EU did not always win. The most striking example concerns the relationship between the FCTC and other international agreements, especially those of the World Trade Organization (WTO). The debate was whether to give priority to health protection over existing agreements, particularly trade agreements, or to subordinate the FCTC to these agreements. Most of the parties, including the EU, strongly wanted the FCTC to prevail over other international conventions. But some other delegations (including the US, New Zealand, Canada and Australia) opposed and implicitly defended the superiority of trade agreements. References made to health superiority during the various INBs were cancelled in the final text. Consequently, the problem will now be dealt with by international trials.

In fact, it appears that there were four strong delegations negotiating the FCTC – the US, Canada, Japan and the EU – and that, without the support of two of these big four, nothing could be adopted, no matter how large the EU made the snowball. There were two reasons for this. First, all four are significant contributors to the WHO – regular and non-ordinary budget – and the only ones able to finance the FCTC negotiations and the Conference of the Parties. Second, most multinational tobacco companies are based in these countries and comply with their national laws so, without ratification by these countries, the Convention would have been hollow.

Special focus must be put on advertising, which is a mixed competence dealt with in Article 13. From the very beginning of the negotiations, it was the most controversial issue within the EU Council's working group on health. While most of the member states were ready to support a complete ban on all forms of advertising, some opposed this strongly, especially Germany. In this special case, the *acquis communautaire* did not provide a firm footing for negotiations. On the contrary, the weak European law on tobacco advertising complicated the EU position regarding negotiations on Article 13 of the Convention. Political, economic, ideological and ethical issues were at stake and blocked the adoption of any European legislation in that field for more than a decade. Finally, a Directive on tobacco advertising was adopted in 1998 (Duina and Kurzer 2004), but it was attacked by Germany and annulled in October 2000 by the European Court of Justice (ECJ) because it had no legal basis.[24] At present, the *acquis communautaire* is based on a Directive on cross-border advertising and sponsorship adopted in 2003,[25] just two months before the last round of FCTC negotiations. In fact, just after its adoption, Germany contested the Directive at the ECJ, arguing that it did not fall within EU competences. As a consequence, during the FCTC negotiations, Germany ignored the Directive because the ECJ decision was still pending. Germany considered that the Directive was not part of the *acquis communautaire* and opposed other EU member states that proposed a strong text on advertising close to the EU Directive. In spite of discussions, no consensus was reached before the fifth INB, with Germany defending a weak position and Ireland, on the contrary, a very strong one. Finally, the Health Group decided to send the issue to the COREPER stressing the strategic importance for

the EU of having a united Community position in such an international negotiation process.[26]

However, during the fifth INB, nine EU member states decided to support a total ban on all forms of advertising, promotion and sponsorship in line with most of the parties to the Convention. One member state, Germany, expressed its opposition to a total ban while five member states decided not to intervene on their own but to support the intervention by the Presidency, stating that the position of the European Community and its member states was to be finalized for the sixth INB. After the fifth INB, nearly every one of the 192 member states of the WHO agreed. Germany and the US, however, were still at odds with other delegations, opposing all proposals limiting tobacco advertising, and they maintained their objections even though they had secured a potential opt-out.

Not only was Germany's attitude detrimental to EU leadership – any refusal by Germany to ratify the Treaty meant that the EU was unable to do so too. The negotiating mandate provided for the Community to become a contracting party, while also stating that the Convention itself should not permit reservations to be made to its provisions, thus allowing, for example, EU member states to be bound by the Convention in areas of Community competence (because the Community has signed) but not for the rest. If the EU as a whole could not ratify the Treaty, the likelihood was that none of its individual member states, and applicant countries, would be free to endorse it. Germany only changed its position a few weeks before the last INB. It could not maintain its isolated position as it faced more and more opprobrium from the Commission, other member states and NGOs.[27] It was becoming increasingly politically damaging nationally, internationally and in the EU context. At the domestic level, the well-known logic of international comparison and of naming/blaming/shaming was becoming easier for national NGOs to use and could have been politically harmful. At the EU level, Germany could fear EU member state reprisals and being excluded from the political game. 'Decredibilization' could also have taken place at the global level. Without doubt, the longlasting erratic position of the EU contributed to the relatively weak Article 13 that was finally adopted. In this case, domestic EU politics coupled with the organization of the Union in the negotiations ruined the capacity of the majority of EU member states to promote their position and strong health measures dedicated to global health.

In addition, during the last rounds of negotiations, some controversial issues persisted, notably advertising and trade (including the relationship between the FCTC and other international agreements, duty-free sales and agricultural subsidies). On all these issues, the EU's position was clearly intended to protect its own commercial interests. Health and development motives were not the sole reason behind the EU's support of the FCTC. For instance, it opposed the abolition of tax and duty-free sales as well as the phasing out of tobacco subsidies. This latter case is very striking. If the principal/agent model is employed, the Commission was clearly the member states' agent in these negotiations. Free riding is almost impossible for a member state – as it is for the Commission. Indeed, the Council and the Commission stood at two extremes: the former opposed the FCTC chair's

proposal to phase out tobacco subsidies, while the latter approved it officially in line with the majority of the parties.[28] In the end, it was the Council's position, i.e. the *acquis communautaire*, that was adopted at the FCTC and promoted by the EU during the negotiations because the mandate given to the Commission did not allow it to go further than the European law. Thus, being involved, and being the leader, in the FCTC was also a way of limiting the level of tobacco control globally while keeping it as close as possible to the EU level. In the FCTC case, the EU only promoted the health dimension of globalization insofar as it matched with European norms.

Conclusion

One lesson from this chapter is that opting for multilateralism to impact on globalization corresponds to the EU's desire to protect its own interests and norms. This does not mean that the EU is not committed to promoting health considerations externally. Indeed, 'the norms diffused may very well be considered valid and legitimate even though the motives … for diffusing such norms are self-regarding' (Sjursen 2006: 239), but it would be naïve to consider that the EU automatically acts as a force for goodness in the globalization process.

Interestingly, this conclusion also applies to the EU's ambiguous role in the issue of access to medicines for developing countries. As for tobacco, it is acknowledged that, following the South African debate on AIDS medicines, the EU, in close relation with the WHO, took the lead in advocating affordable medicines for developing countries (Hveem 2007). For instance, the European Commission contributed clearly to the adoption of the WTO agreement on Trade-Related Intellectual Property Rights (TRIPS), enabling developing countries to use compulsory licences to obtain medicines that their populations need (a compulsory licence permits a government to confiscate a valid patent). At first, there was a condition that the medicine must be manufactured in the country concerned (for a summary, see Sund 2003). But as these countries are usually unable to produce pharmaceuticals in the short term, a 2005 amendment to the agreement now permits medicines to be imported under compulsory licence if measures have been taken to avoid re-exportation to developed countries. In parallel, in 2003, the Council adopted a regulation that aimed 'to ensure delivery of cheap medicines to developing countries'. As declared by the then EU Trade Commissioner, Pascal Lamy, *a priori* 'this regulation is an important contribution to a global partnership ensuring cheap yet sustainable supply of key medicines to the populations of poor countries'.[29] However, this measure as well as the WTO agreement on compulsory licence cannot be seen *only* as a means to improve the health situation in developing countries. It also helps to protect the established pharmaceutical industries from the potential new competition of developing countries in manufacturing pharmaceuticals – especially India and China, which are included in the seventy-six targeted countries – to which the first version of the WTO agreement could have led in the mid term. Moreover, if poor countries do not make use of compulsory licences to produce their own medicines but import medicines, it will

allow industries to sell their products – even at a low price – rather than to see them simply 'confiscated'. WTO and EU measures also enable the pharmaceutical industry to expand their markets to new countries by ensuring that medicines sold in poor countries will not compete with medicines sold at higher prices in richer countries.

The analysis in this chapter also shows that, in adopting hard laws, soft law instruments and diffusing values and ideas, international organizations play a major role in this process. Consequently, it is not possible for the EU to remain apart from international organizations if it wants to be a player in this process and, notably, if it wants to promote social considerations abroad. Its deep involvement in the WHO demonstrates that the EU is aware of this reality, at least in health matters. The WHO is clearly a tool for the Union to use to impact on the health dimension of globalization. The FCTC is an example of the EU's success in doing so. Thanks to its strong internal policy on tobacco control and its capacity to speak with one voice most of the time – these two elements providing the EU with credibility and negotiating power – it was able to influence the international treaty and to export its own norms abroad. However, this power is particularly fragile. The complex nature of the EU and the mechanism of international negotiations favour incoherence between internal and external policies – and inconsistencies between different priorities – especially if the policy the EU wants to promote externally does not have solid roots at EU level.

In parallel with its power to negotiate international hard law, the EU can make use of softer instruments – networking and idea diffusion – to promote the social dimension of globalization through the WHO. Thanks to the unending enlargement of its activities and improvement in its skills in the health field, as well as its intimate relationship with the WHO, the EU probably has an even more powerful resource to impact on the social dimension of globalization than through rare and partly aleatory hard laws. But this does not prevent incoherence and inconsistency; on the contrary, in such everyday situations, co-ordination among EU institutions and across policies is less developed than it is for issues dealt with in the grand bargain. Again, the EU's international role is strongly linked to its internal priorities and policies (Guigner 2006). The Union cannot support the social dimension of globalization efficiently if social policies do not have priority over competing policies at EU level. In other words, the EU's external influence on the social dimension of globalization begins at home.

Notes

1 For instance, the 2004 SARS outbreak, although limited, induced a loss of US$ 15 billion to the global economy (Kickbusch and Lister 2006).

2 See http://europa.eu.int/comm/dgs/health_consumer/library/speeches/speech95_en.html (accessed 24 March 2008).

David Byrne makes reference to an exchange of letters between the EU and the WHO in December 2000. Note that there was also an exchange of letters between the EU and the ILO in 2001 (see Chapter 1).

3 Numerous other UN agencies, often collaborating with the WHO in global networks, also deal with health issues, such as the United Nations Children's Fund (UNICEF), the Food and Agriculture Organization (FAO) or the ILO.

4 Speech by David Byrne at the WHO European Ministerial Conference for a Tobacco-free Europe (known as the ‘Warsaw Declaration’), Warsaw, 19 February 2002.
5 EU–WHO relationships are indeed referred to several times in the Commission Communication on multilateralism and presented as an example of good practice to be used in other multilateral activities (see European Commission 2003: paras 2.1 and 3.1).
6 The distinction between technical and political decisions refers to the process of adopting these decisions and to their content (the latter are more precise), but we totally agree that expertise and politics cannot be disentangled (Radaelli 1999). This is why these technical relationships are so important.
7 In fact, the EU developed some public health activities in the mid-1980s. In 1992, the Maastricht Treaty institutionalized such activities and explicitly called for EU co-operation with international organizations (Guigner 2008).
8 The WHA is made up of delegations from 193 member states. Its main role is to determine WHO policies, to supervise its budget and to examine the reports of the Executive Board. The EB comprises thirty-four members technically qualified in the field of health and elected for three-year terms by the WHA. The EB’s main functions are to advise and facilitate the work of the WHA and to follow up on its decisions. The organization is headed by a Director General appointed by the WHA following nomination by the EB.
9 The following developments are mainly based on a European Commission note – unpublished and not made public – and on interviews conducted in 2003 by the European Commission’s DG Sanco.
10 As an agency of the UN, the WHO is a global organization but is subdivided and organized into regional offices; there is thus a European office based in Copenhagen. WHO-Europe is composed of fifty-two member states, including the twenty-seven EU member states.
11 At the European regional level, the situation is different as most states know more or less what the EU and the European Commission are.
12 With the exception of the revised IHR adopted under the auspices of the WHO in 2005, for which the EU obtained a negotiating mandate (the IHR aims to ensure maximum security against the international spread of diseases with minimum interference with world traffic), and the International Partnership on Avian and Pandemic Influenza (IPAPI) in which the EU participates and has co-organized several international conferences at the global level in collaboration, notably, with the WHO.
13 The office already existed but was moved and upgraded in 1999.
14 Many specific health issues are debated (health system reforms, consequences of smoking, etc.), and ‘new’ diseases are subject to scientific and political consideration (AIDS, SARS, etc.).
15 Future studies of the WHO–EU relationship based on different cases studies would probably show that sometimes the EU influences the WHO, and sometimes the opposite is true. Accordingly, EU–WHO relationships provide a good opportunity to test further constructivist arguments and to establish variables of influence.
16 Indeed, tobacco use is linked to individual socio-economics status. Individuals with low socio-economic status (education and income) tend to smoke more than those with a higher socio-economic status and to suffer from the greater impact of tobacco use. For example, tobacco addiction can lead to malnutrition because money is spent on tobacco products rather than food (WHO 2003).
17 For instance, tobacco leaf exports account for 60 per cent of Malawi’s total export revenues. In Armenia, China and Turkey, for example, taxes on cigarettes represent about 10 per cent of total government revenues (World Bank 2003).
18 More precisely, the Community positions were established as follows: (1) for areas of Community competence, the majority was that required by the Article in the Treaty regulating the area in question (qualified majority or unanimity); (2) in areas of member state competence or mixed competence, consensus was required.
19 Of course, states that disagreed with the regional position could, at any time, communicate and defend their opinion.

20 The Convention of the Parties is a body in charge of implementing the FCTC.
21 The US, which has strong economic interests in growing and manufacturing tobacco, and Canada, which has strong tobacco control legislation, were often in opposition during the FCTC negotiations.
22 EC Directive 2001/37/EC of 5 June 2001, OJ L 194.
23 Interview, French Ministry of Health official, Paris, April 2006.
24 The Directive was based on Article 95 of the EC requiring EU law to serve market integration. Germany and the ECJ argued that the Directive had public health as its primary goal.
25 EC Directive 2003/33/EC of 26 May 2003, OJ L 152.
26 The following comments made by the Health Group on the position that COREPER could adopt are very clear on that point (European Commission non-paper, October 2002): 'COREPER decides the EC should abstain from referring to this point during IBN 5 (risk of damage for the EC image in the negotiations, especially if MS (i.e. Ireland) decide to intervene on their own); COREPER decides that MS which oppose the Community position sustained by the majority are allowed to express reservations (breaks the unity of the Community representation, but would untie the present situation); COREPER opts for a mild text and decides that the matter should be dealt with by a protocol (risk of having a weak text)'.
27 See, for example, the following declarations: 'The Community should not accept that due to the blocking attitude of one Member State, 14 countries have to accept the position of the smallest (and weakest) common denominator. That would make our position on a crucial FCTC provision almost meaningless and send a very negative signal to the rest of the world' (Council non-paper, October 2002); 'Germany blocks 24 European countries from endorsing tobacco Treaty' (Health NGOs, Press release, 2 May 2003).
28 See David Byrne's speech at the WHO Conference for a Tobacco-free Europe, Warsaw, 19 February 2002.
29 The regulation states that medicines on the list – limited to those designated to combat HIV/AIDS, malaria and tuberculosis – shall be sold by the industry 'either with a price cut of 75% off the average "ex-factory" price in OECD countries, or at the cost of production plus 15%', and that 'being on this list and bearing the logo will mean that imports of these products into the EU for free circulation, re-exportation, warehousing or trans-shipment will be prohibited' (EU 2003).

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9 The social dimension of EU trade policies

Jan Orbie, Myriam Gistelinck and Bart Kerremans

This chapter discusses the social dimension of the European Union (EU)'s most powerful external policy domain: trade. After an introductory section summarizing the international debate on the inclusion of labour standards in trade policy instruments – the so-called social clause – the chapter focuses on the EU's position in this discussion. Besides the Union's role in the World Trade Organization (WTO), we also consider and evaluate its policies promoting core labour standards (CLS) through unilateral and bilateral trade policies. Subsequently, we offer some explanations for the EU's limited internal ability to reach decisions on, and for its cautious stance in relation to, a social clause. Attention will be paid to four factors: the ideological disposition of EU member state governments; member state concerns about possible creeping EU competences in the area of labour regulations; the fact that trade-related labour standards may be less important for the member states than other trade-related objectives and concerns; and the increased attractiveness of the International Labour Organization (ILO) as an alternative to a WTO-based approach to international labour standards.

The international debate on labour standards in trade agreements

Whereas the promotion of CLS as fundamental human rights is widely considered as a legitimate goal in international relations, the potential use of trade instruments when pursuing this objective has been the subject of much debate among academics and policy-makers. Can laudable social policy objectives, such as freedom of association and the abolition of child labour, be advanced by integrating them into international trade rules?

This is precisely the debate on a social clause – broadly defined as any binding linkage between CLS and trade policy measures. Neo-liberal economists tend to oppose this idea, arguing that the pursuit of free trade will eventually entail economic and social development (cf. the 'trickle down' theory). According to this point of view, the incorporation of labour standards in trade relations may well endanger the liberal trade regime. For all the lofty ideals behind non-governmental organizations' (NGOs) proposals for a social clause – who would 'oppose child labour on the moon, if Carl Sagan or Neil Armstrong had been able to find life

there, even if we did not trade with the moon' (Bhagwati 1999: 14–16) – in practice, policy-makers cannot be trusted with such a discretionary power in trade policy. The mere existence of a seemingly legitimate barrier to trade would lead to protectionist misuse by governments, pressured by unions and vulnerable industries. Developed countries would use social clauses as veiled protectionist instruments, jeopardizing the comparative advantage of developing countries in international trade. Therefore, the latter are also highly critical of the idea of linking labour standards and trade rules (cf. Lee 1997).

Yet, a 1996 Organization for Economic Co-operation and Development (OECD) study concluded that 'concerns expressed by certain developing countries that core standards would negatively affect their economic performance or their international competitive position are unfounded; indeed, it is theoretically possible that the observance of core standards would strengthen the long-term economic performance of all countries' (OECD 1996: 13). The finding that a country's compliance with CLS – seen as human rights and to be distinguished from standards related to socio-economic development, such as minimum wages – does not affect its competitiveness puts the 'race to the bottom' hypothesis into perspective.

This is not to say that the OECD claims that social clauses should be used to advance CLS. It sides with mainstream neo-liberal thinking in emphasizing that – besides trade liberalization and export-led growth – other instruments should be employed to achieve this objective. In this regard, some point to the role of development aid budgets, but more emphasis is usually put on soft governance mechanisms (see Chapter 1) such as corporate social responsibility, private codes of conduct for multinationals and social labelling. The importance of indirect influence by the ILO is also highlighted.

Proponents of a social clause do not question the ILO's contribution, or the relevance of development aid. Rather, they argue that 'fair' trade rules should somehow allow for interventionist trade measures favouring CLS, while at the same time providing enough guarantees against protectionist abuse. This reasoning is widespread in the developed world, especially with leftist governments, and reflects the post-war ideological tradition of 'embedded liberalism' (Ruggie 1982), which assumes that sole reliance on the forces of the free market cannot stimulate broader societal objectives. For that to be the case, competition needs to be embedded in a strongly regulated socio-economic system.

Advocates of a social clause also refer to moral arguments and to the legitimacy of the international trading regime. The free trade system may be efficient, but it also needs to be perceived as legitimate by the public at large. One implication of this reasoning may be that the incorporation of labour standards in the world trade regime is necessary to preserve the legitimacy of the liberal international trading system, and to prevent a popular and protectionist backlash against globalization at large.

The idea that multilateral economic co-operation can allow for interventionist policy measures at the domestic and international level, without provoking a protectionist backlash, also inspired the United Nations Conference on Trade and Employment and the Havana Charter (1948). The resulting International Trade Organization (ITO) even established an institutional linkage between trade and

CLS. It provided for co-operation with the ILO, and foresaw that complaints about unfair labour conditions could be brought before the ITO's dispute settlement procedures (cf. Article 7, Havana Charter; Drache 2002).

However, after a coalition of 'protectionists' and 'perfectionists' in the US Congress had rejected the ITO, the provisional General Agreement on Tariffs and Trade (GATT) chapter of the Havana Charter was promoted to the main pillar of the post-war international economic architecture. Labour standards became disconnected from the world trade regime, with the notable exception of an 'ITO remnant' in GATT Article XX(e), which permits governments to ban trade in goods produced using prison labour. The breakdown of the ITO created a path-dependent process, whereby labour standards were seen as incompatible with, and thus separated from, the multilateral trade regime.

Although the 'free versus fair trade' debate has been going on for decades (Charnovitz 1987), it only became a hot international trade issue in 1993–94. During the final stage of the GATT Uruguay Round, a growing body of opinion expressed itself in favour of including labour standard provisions in the WTO agreements. The US and France were particularly enthusiastic about this. They argued for the establishment of a working group – within the newly created WTO – on the social dimension of trade liberalization. This was fiercely opposed by the developing countries, most prominently Malaysia, India and Pakistan, although countries such as the UK and Germany were equally reluctant. A last-minute compromise meant that the issue could be put on the WTO agenda at a later stage.

During the subsequent years, the debate on a social clause became increasingly politicized, culminating in the WTO Singapore Conference in 1996. The Singapore Declaration *de facto* relegates the issue to the sidelines, referring to the ILO as the competent organization to deal with international labour standards, thereby consolidating the idea that social issues are not to be dealt with in the multilateral trade regime (cf. Wilkinson 2001: 402, 411). EU and US attempts to put this on the agenda at the WTO Millennium Round failed with the collapse of the 1999 WTO Seattle Ministerial Conference, partly because of the growing assertiveness among those developing countries that strongly rejected US President Clinton's suggestion of introducing a punitive social clause in the WTO. When a new trade round was finally launched in Doha (2001), the agenda simply referred to the Singapore text (see below). Labour standards are still excluded from multilateral trade negotiations.

This deadlock at the WTO level sharply contrasts with the ILO's success in presenting itself as the appropriate international forum on labour standards. Stimulated by the WTO's Singapore Declaration, it put forward the ambitious 'Declaration on Fundamental Principles and Rights at Work' in 1998 (see Chapter 1). Shortly before Doha, the World Commission on the Social Dimension of Globalization (WCSDG) was set up, providing a diplomatically convenient alternative to the thorny WTO discussions.

The idea of a social clause thus remained a non-issue in trade affairs. Expectations that increased competition between developing countries following China's accession to the WTO would increase the support for a social clause have not materialized.

The European Union's position

The above makes clear that the inclusion of labour standards in the WTO legal framework faces strong opposition, especially from developing countries. The debate in the WTO is not, however, tantamount to a 'north–south clash'. Some 'northern' WTO members are too ambivalent on this for that to be the case. The European Union – one of the biggest players in the WTO – is a typical example of this. A closer look at the EU's approach to this issue is thus warranted.

As argued by Meunier and Nicolaïdis (2005: 907), the EU is not only a formidable power *in* trade, but it is also becoming a power *through* trade. Trade is traditionally the Union's most powerful external policy domain, which provides it with some leverage to act as a normative power in the world (Manners 2002). However, this leverage depends on the EU's capacity to define consistently the kind of norms and values it wants to pursue, and to act accordingly. With regard to CLS and their relation to international trade rules, an account of the EU's multilateral, bilateral and unilateral trade policies reveals that such consistency has been a major problem.

Despite a short debate about the integration of labour considerations in the Lomé Conventions, and the Generalized System of Preferences (GSP) at the end of the 1970s, it took until 1993–94 before the debate on a 'social clause' resurfaced on the European agenda (Orbie *et al.* 2005: 160–61). Shortly before the 1994 Marrakesh Conference of the GATT, the European Commission sided with the idea of a social clause, at the instigation of member states such as France and Belgium as well as the European Parliament. However, the desirability of labour standards within the newly established WTO regime was questioned by the conservative governments in Germany and the UK (Waer 1996: 26). As a result, the EU could only present a vague statement on the social issue in Marrakesh. During subsequent WTO Ministerial Conferences, the Commission continued to support the idea to incorporate labour standards into the WTO regime – or at least to discuss the linkages between the world trade regime and CLS during the new trade round.[1] In Singapore (1996), it pushed for the establishment of a WTO working group to investigate the relationship between trade and labour standards, but was hindered in this demand by strong opposition from the UK. In Seattle (1999) and Doha (2001), the Commission proposed a Joint WTO–ILO Standing Forum. Throughout its efforts to find an internal consensus on the issue, the EU stressed that protectionist misuse of labour standards should be avoided and that Europe favoured an incentive-based approach rather than sanctions.

Proposals for a social clause did not remain limited to the multilateral trade level. Most bilateral agreements negotiated by the EU after 1995 also include a chapter on social co-operation and/or references to CLS. Contrary to the so-called 'human rights clause' used in all EU external trade and co-operation agreements in a rather homogeneous way, the Union does not seem to have one clear-cut formula for a 'social clause' to be inserted in all bilateral trade agreements. Rather, a tailored approach is chosen in accordance with the trade partner at the negotiation table, a practice that is also apparent in the new bilateral and biregional trade

negotiations that the EU is currently conducting with emerging economies in Asia and Latin America (Bossuyt 2009).

Indeed, it seems as if the EU's famous 'preferential pyramid' (Panagariya 2002) is reflected not only in its tariff structure, but also in the rule-making clauses (such as labour standards) included in its bilateral trade agreements. Roughly speaking, two types of social clauses can be distinguished. One type is used in agreements with (potential) candidate member states and with those countries covered by the European Neighbourhood Policy (see Chapters 3 and 4). In this first group, the social co-operation provisions aim to promote harmonization with EU Treaty provisions (concerning equal treatment for men and women and health and safety in the workplace) or are clearly connected with other specific EU policy goals (e.g. dialogue on the movement of persons in the case of the Euro-Mediterranean Association Agreements) (Grynberg and Qalo 2006: 641).[2]

The second type of social clauses usually consists of a commitment by both negotiating partners to promote 'international labour standards' as defined by the ILO. This category of social provisions can be found in the Cotonou Agreement (which was reiterated in the Council's 2003 negotiation mandate for future Economic Partnership Agreements) and the EU–Chile Association Agreement.[3]

Social conditionality is also included in Europe's unilateral GSP system. Since 1995, the EU can withdraw the GSP of those developing countries engaging in forced labour or prison labour. In 1998, the EU added a 'carrot' to this system, granting additional GSP to countries that comply with a number of CLS.[4] In 2001, the legal basis of the GSP incentive and sanction clause was extended to include the eight fundamental ILO conventions (see Chapter 1).[5]

The EU has clearly made some effort to promote respect for labour standards through its bilateral and unilateral trade instruments. Whether it has been successful is debatable. An internal evaluation of the European Commission concluded that 'we could have done more'.[6] Some maintain that the Union has made significant progress in promoting social and labour rights, particularly through its bilateral trade agreements with Chile, the Africa, Caribbean and Pacific Group (ACP) and South Africa (Doumbia-Henry and Gravel 2006: 190). Others argue that, despite references to international labour standards, the EU emphasis is rather on general human rights, included as an 'essential element' in all its bilateral trade agreements (Clapham and Martignoni 2006: 291). Whereas a serious violation of human rights may allow the EU to terminate or suspend the operation of its agreements (Fierro 2003: 43), this type of 'trade conditionality' does not exist at all in the case of labour standards. On the contrary, the phrase, 'labour standards should not be used for protectionist purposes', included for instance in the Cotonou Agreement, seems implicitly to preclude the use of sanctions in the case of non-compliance with labour standards.[7] Unlike the US, whose bilateral trade agreements provide clear potential sanctioning tools, such as fines and even trade measures, the EU has always rejected a sanctions-based approach to labour standards in its bilateral trade agreements. Instead, the emphasis is put on setting up institutional arrangements for dialogue on social standards at intergovernmental and occasionally civil society level (through the so-called 'Observatories').

The impact and the relevance of these dialogue mechanisms seem to be rather limited. As regards the Cotonou Agreement, for instance, it is striking to see that the 'social dimension' of EU–ACP relations has rarely figured on the EU–ACP Joint Council agenda since the Agreement was signed. Moreover, the declaration of the Danish Presidency in 2004 concerning Zimbabwe has been the only declaration referring to CLS up to now within the framework of EU–ACP relations. Surprisingly, this declaration referred to Zimbabwe's obligations as a member of the ILO and not to its being a party to the Cotonou Agreement.

Along with the dialogue mechanisms, since 1999, the EU has also been committed to conducting sustainability impact assessments (SIAs) of bilateral negotiations and agreements, which assess the impact of free trade agreements on social development in both the EU and partner countries. Although a considerable amount of financial and staff resources have been devoted to these studies, their impact has been limited. According to Raza (2007: 80), trade SIAs remain 'an academic exercise', which serve to legitimize EU trade policies, but without having any substantial impact upon the actual conduct of the negotiations. Most bilateral agreements also create room for co-operation and technical assistance in the field of social rights, thereby transferring the 'social' dimension of trade policies to the domain of EU development policy.[8]

As for the unilateral GSP regime, the application of social conditionality long remained limited to three countries: Burma (the 'stick', because of forced labour, since 1997); Moldova ('carrot', since 2000); and Sri Lanka ('carrot', since 2004). In its evaluation, the European Commission (2001b) admitted that 'the special incentive arrangements did not encounter the success that was hoped for at the time they were adopted'. Faced with these disappointing results and with a WTO ruling against the GSP drugs incentives (see below), the EU reformed its GSP conditionality. In order to qualify for special GSP under the new 'sustainable development and good governance' regime, developing countries have to ratify and implement several international agreements, including the eight fundamental ILO Conventions (see Table 1.1 in Chapter 1). However, the EU's coherence in granting special incentives can be questioned (see below). Moreover, the impact of this new system on the implementation of CLS in beneficiary countries remains to be seen (Orbie and Tortell 2009).

Overall, it can be concluded that the EU's approach to the issue of labour standards and trade agreements has been characterized by a limited ability to take decisions internally and, where it did succeed in so doing, by caution and an inclination to prefer positive incentives over sanctions. The following sections will develop four types of reasoning to explain why this should be the case.

Ideological obstacles to a common European stance

The European Community has long failed to produce a clear and common stance on labour standards in trade agreements because of principled opposition from some member state governments. Although the Commission and some member states supported discussions on this topic in the WTO from 1994 onwards, the

Council of Ministers was divided on the issue. The desirability of labour standards within the newly established WTO regime was doubted in particular by the conservative governments in Germany and the UK (Waer 1996: 26). As a result of these disagreements, the Council could only present a vague statement on the social issue at the Marrakesh Conference. In the first half of 1995, the French Presidency attempted in vain to achieve an EU compromise (see also Chapter 1).

In the run-up to the Singapore Ministerial Conference, the issue was brought up again and fiercely opposed by the UK and – to a slightly lesser extent – by Germany. The debate in the German Bundestag on this Conference clearly indicated that a gap existed between the German coalition government (CDU/CSU and FDP), on the one hand, and the opposition parties, on the other. Such a divide could be expected to a certain extent as a consequence of the predictable opposition between government majorities and their parliamentary opponents. Nevertheless, the debate itself indicated that this opposition was more deeply rooted. It indicated that the left and right in Germany approached the importance of free trade as a tool for economic and social development in the developing world, on the one hand, and the preservation of German prosperity, on the other hand, in a different way. For the CDU/CSU and FDP, trade liberalization was seen as a way of achieving the former and preserving the latter. For those parties, the inclusion of labour standards in the WTO legal framework threatened to jeopardize such liberalization. For the left (SPD, Bündniss90-Greens, PDS), minimum labour standards in WTO agreements were a condition *sine qua non* for the achievement of both objectives.[9]

In the UK, a similar kind of ideological split was visible. Whereas MPs from the ruling Conservatives applauded the Singapore outcome on labour standards, Labour MPs expressed their dismay. Importantly, however, almost all of them were members of the Socialist Campaign Group, a group of left-wing MPs in the British Labour Party. Indeed, these so-called 'Old Labour' MPs dominated Labour criticism of the Singapore outcome. While these Labour MPs stressed the acceleration of child labour as a consequence of globalization, and expressed doubts about the raising of standards of living 'at all levels of society' as a consequence of liberalized trade, Conservative MPs, as well as members of the UK government, reaffirmed their belief in trade liberalization as the best strategy to raise such standards, including labour standards. Consequently, whereas the latter perceived references to the ILO in the Singapore Declaration as a successful attempt to shield the world trading system from creeping protectionism, the former defined these references as hypocritical and shameful on the part of the WTO (and the British government that had strongly supported them).[10]

British and German opposition resulted in the Council Presidency's inability to bring an EU compromise to the conference. Europe's invisibility in Singapore is all the more relevant given the importance of this WTO conference for the future debate on a social clause. As indicated above, the Singapore Declaration *de facto* puts this topic on the sidelines, referring to the ILO as the competent organization to deal with international labour standards, and thereby consolidating the idea that the multilateral trade regime should not deal with social issues (Wilkinson 2001: 402, 411).

It took until the Seattle Ministerial Conference in 1999 before the '15' reached a common position.[11] An important explanation for the new-found European consensus is that social democratic parties had become dominant in most EU governments, including the UK and Germany. However, the impact of this was greater in Germany than in the UK. In sharp contrast to the position taken by the German government in the run-up to the Singapore Ministerial Conference, the Social Democratic/Green coalition government took the most extreme position in favour of a social clause in the WTO of all EU member states during Union preparations for Seattle.[12] Likewise, together with Sweden, the German government continued to press for stronger language on labour rights in the run-up to the Doha Ministerial, largely in response to the position taken by the Commission that the Seattle Ministerial had made clear that the developing countries would never agree with a dialogue on labour standards within the framework of the WTO. Consequently, the German government could not be completely satisfied with the outcome on labour standards at the Doha Ministerial,[13] as it indicated in a Bundestag debate on the issue.

On the British side, no major difference appeared compared with the stance of the previous government in the run-up to the Singapore Ministerial. Then and now, the British government opposed the creation of a working group on labour standards and trade in the WTO.[14] Consequently, no frustrations were expressed by the Tony Blair government as regards the Doha outcome. Its rhetoric on this outcome in relation to labour standards was basically similar to that of the John Major government after the Singapore Ministerial. The only difference this time was that Old Labour opposition was more muted. The same observation can be made about the parliamentary debates and questions that preceded both the Seattle and Doha Ministerials and that dealt with the position the British government was defending in the EU on the question of labour standards in the WTO.[15]

That the EU succeeded in finding a common position on labour standards before the start of the Seattle Ministerial was largely due to the realization by those member states that favoured their inclusion in the WTO legal framework that this was simply not feasible because of virulent opposition from developing countries in the WTO. As the European Commission indicated in its proposal to the Seattle Ministerial, the Singapore Ministerial had made this particularly clear.[16] The outcome of internal EU deliberations on the Seattle Ministerial – in which the labour standards issue had been one of the two most controversial topics (together with the cultural exception clause) – focused on the efforts the Union would make in the WTO to create a Joint ILO – WTO Standing Forum on Trade, Globalization and Labour, with the purpose of promoting 'a better understanding of the issues involved through a substantive dialogue between all interested parties (including governments, employers, trade unions and other relevant international organisations)'.[17] This forum would *inter alia* prepare for a ministerial-level meeting that would be hosted by the EU and was supposed to take place within two years. The outcome – proposed by the Finnish Council Presidency – split the difference between supporters and opponents of labour standards in the WTO legal framework. It did not create a working party for that purpose in the WTO. It merely provided for a Standing Forum, which would not become a permanent

component of the WTO's institutional framework, the reference to 'Standing' suggesting that the forum would not be restricted to one meeting only. Neither was there any guarantee that it would link labour standards to WTO agreements. But it would at least reopen the door – closed at Singapore – to a discussion on labour standards within the WTO.

To satisfy the opponents, the linkage of this discussion to the ILO was stressed through the 'Joint' character of the ILO–WTO forum, leaving the door open to an outcome in which the existing (exclusive) role of the ILO in this area would be confirmed. The latter was also considered to be elementary to entice developing countries into the labour standards discussion. With the same purpose in mind, the EU's position also stressed that the dialogue was aimed at WTO encouragement of 'positive incentives' to promote observance of core labour rights, and indicated its opposition to 'any sanctions-based approaches' (Council 1999: para. 13). At the end of the day, resistance from these countries proved insurmountable.

Likewise, in the run-up to the Doha Ministerial, developing countries continued to resist any EU efforts or semblance of such efforts to bring the labour rights debate into the WTO.

Competence concerns as impediments to a proactive EU policy

Disagreements within the Council cannot simply be attributed to ideological factors. Member state sensitivities about creeping EU competences also played a role. In general, the 1990s witnessed serious competence conflicts between the member states and the Commission about the scope of Europe's external trade competences, on the one hand (e.g. ECJ Opinion 1/94), and about further intra-European integration of ILO labour standards, on the other (e.g. ECJ Opinion 2/91; see also Chapters 2 and 5). The idea of a social clause is, by definition, situated at the crossroads of these policy domains. Member states were anxious that social conditionality in trade would *de facto* strengthen, or at least facilitate, the Community's role regarding labour issues.

For example, in the context of the first GSP scheme with social conditionality, member states such as the UK and Germany, but also declared proponents of a social clause such as France, Denmark and the Netherlands, added a declaration to the Council minutes, stressing that the references to labour standards in ILO Conventions did not imply any EC competence with respect to the content of these Conventions.[18] As suggested by Messerlin (2001: 166), external EC competences to promote labour standards could lead to a 'boomerang effect on *intra*-EC relations'. And this may well explain the reluctance by several member states to engage in an ambitious external policy to promote CLS. Hence, the problems of complementarity and co-ordination, which also characterize EU–ILO relations, spill over into the European debate on a social clause.

At a more general level, the Union's limited international capacity to act in the area of a social clause also reflects its institutional set-up. As a 'regulatory state' (Majone 1994), the EU's mandate has been focused primarily on the functioning

and deepening of the internal market. In contrast, more difficult redistributive measures have remained largely at the national level. This EU position is also mirrored in its international trade policy, where it mainly aims to project its internal market to the global level – i.e. the Union's deep trade agenda, including regulatory convergence besides liberalization – but without engaging in interventionist measures. Here again, consistency can be discerned between Europe's internal 'market model' and its external position (cf. Chapter 2).

Not a priority on the trade front

Apart from internal disagreements, it should also be noted that Europe's general commitment to promote CLS through trade has been ambiguous. Even when the EU had finally reached a compromise position, its ambition and proactiveness have been tempered by its consideration of other objectives. For example, for obvious economic reasons, the GSP social incentives were too small to be attractive for most potential beneficiaries. Northern member states and European importers criticized the EU for being more concerned with the prospect of increased imports than with a coherent strategy for improving labour standards in the world (e.g. Von Schöppenthau 1998: 44). In addition, the number of potential beneficiaries was also limited because of the Union's other preferential trade regimes *vis-à-vis* developing countries. These other trade arrangements discouraged them from applying for the social incentive clause because they already enjoyed more favourable market access than 'normal GSP' beneficiaries.[19] Significantly, some of these trade schemes were established simultaneously with the GSP social incentive scheme.

For example, the special GSP drugs incentive system, which had granted additional market access to those Andean countries that had been fighting drug trafficking and production since 1990, was extended in 1998 to include the members of the Central American Common Market. The Commission proposed henceforth that beneficiaries from these schemes also had to comply with the CLS. But the countries involved began an intensive lobbying campaign in the European capitals, and the Council decided to unlink the drug and labour incentive arrangements. Thus, the newly established GSP social incentive scheme became almost superfluous for these Latin American countries. The international trade union movement and the European Parliament strongly criticized this concession, pointing to the assassination of nearly 1,500 trade union activists in Colombia.

Labour considerations were also overshadowed by other priorities at the bilateral and multilateral trade levels. One of the main characteristics of the EU's bilateral trade agreements is its very broad scope, covering many dimensions of trade rule-making such as trade in services, Singapore issues (competition, investment, trade facilitation and transparency in government procurement) and intellectual property rights (McQueen 2002: 1372). Some authors refer to these issues as being part of the EU's 'deep trade agenda' (Young and Peterson 2006: 788). Given the difficulty of including such behind-the-border matters in a satisfactory way in multilateral negotiations, they have become an EU priority in the bilateral context. In comparison, labour standards are of a secondary nature.

Moreover, next to advancing the Union's economic governance rules worldwide, most EU bilateral agreements include extensive mechanisms for political dialogue. As seen for instance in the Cotonou Agreement, these mechanisms are usually employed by the EU to express concerns regarding respect for fundamental human rights, democratic principles, good governance and the rule of law.[20]

Owing to the dual role played by bilateral agreements as a vehicle of the EU's 'deep' trade agenda, on the one hand, and an instrument of the EU's human rights and democratization efforts, on the other, labour standards do not seem to stand out as a clear priority. As a matter of fact, when important commercial interests appear to be at stake, even the democracy and human rights clauses included in these agreements are not supported unambiguously by the Commission or the EU member states, as was the case, for instance, with the agreement with Mexico and, more recently, at the start of negotiations with China and India.

Commercial considerations also seem to prevail at the multilateral level. While officially maintaining the EU Seattle mandate and its preference for a permanent ILO–WTO forum, several months before the Doha Conference, it became clear that the EU was gradually abandoning this demand as a concession towards developing countries (cf. Novitz 2002: 7–8; Van den Hoven 2004: 265–67). In its July 2001 Communication on international labour standards, the Commission basically argued that the goal of promoting CLS remained the same, but that the ILO was a more suitable forum to discuss this. There is no reference whatsoever to the Doha Conference, which is surprising given the timing of the document (European Commission 2001a). On the same day, the UK's *Financial Times* (18 July 2001) put it more clearly: according to the Commission, attempts to include labour standards in the WTO would jeopardize a new trade round (see also Chapter 1). Again, Europe's relatively cautious approach to a social clause contrasts with its offensive pursuit of (equally contested) issues such as those concerning investment and competition. The latter were only dropped from the EU's wish list after the failure of the 2003 WTO Cancún Ministerial. In terms of coherence, it may thus be argued that the promotion of social objectives through trade policy became subordinated to the 'core business' on the EU trade agenda.

How can such a choice of priorities, whereby labour standards seem to be secondary to other trade-related concerns, be explained? The answer may be found in the way in which interests are aggregated in the EU member states, and the role that interest aggregation within national political parties plays here (Kerremans and Gistelinck 2008). Indeed, when it comes to the labour standards issue, the role of national political parties can hardly be neglected. All the representatives in the Council of Ministers, a key institution in the EU decision-making process on trade, belong to national political parties that try to shape the position taken by their country's national government, thereby using the need for their support in parliament as leverage.

Political parties act as aggregating mechanisms in society. They aggregate and represent a broad array of societal interests and concerns. In so doing, they take into consideration both specific interests and the interest – as they perceive it – of society as a whole. The perspective from which they engage in this aggregation

reflects the scale on which the party is organized. National parties will tend to weigh specific sectoral or geographically concentrated interests against the national aggregate effects of the policy choices they make. However, this aggregative capacity of the political parties depends on the extent to which they are able to control those who hold political office, in particular in their national parliament and government. The stronger that control, the more the geographical scale at which the party operates will matter, and the less this will be the case for the interests of each of the electoral districts that the electoral system provides for. Consequently, national party positions are affected more by an integrative aggregation logic than by the additive logic that prevails when majorities need to be constructed on the basis of log-rolling between individual members of parliament. Therefore, the scale at which the costs and benefits of possible policy alternatives will be assessed will be national rather than local. The intensities of interests will need to be such that they trigger a sufficiently high level of inside and outside lobbying so that they outperform the voice of all, or most other, interests in society. Neglecting this voice would need to come at a substantial electoral cost for the political party as a whole.

In the EU, this is indeed the case. All EU member states can be characterized as party democracies, that is parliamentary democracies in which party discipline in parliament is strong and in which internal party control mechanisms supersede the normal role that parliamentary majorities have in controlling governments. Consequently, internal party interest aggregation mechanisms prevail and, with them, the role that collective interests play in such aggregation. Local – geographically concentrated – interests have less chance to weigh heavily, which leads to a high probability that they will have to cede to aggregate welfare and political concerns. In addition – as Sapir (2001) noted – the extensively developed welfare state systems of the EU member states smoothes the impact that trade liberalization has on employees, and with it the incentives for a substantial part of them to raise their voices and engage in political activism. The probability that their voices will outperform other concerns in and about society is thus low, as is the probability that national political leaders will be prepared to invest a substantial amount of political capital in protecting domestic jobs by confronting developing countries over international labour standards.

Increased relevance of the International Labour Organization

In parallel with abandoning a social clause on the WTO agenda, the European Commission has increasingly emphasized the ILO's role in the international promotion of labour standards. As explained in the first chapter of this book, in all its recent communications on the issue, a greater emphasis on dialogue, stimulation, non-binding mechanisms such as development co-operation (see Chapters 11 and 12) and corporate social responsibility (see Chapter 10), on the one hand, and increased co-operation with the ILO (see Chapter 5), on the other hand, is clearly noticeable.

This increased relevance of the ILO is also reflected in the EU's bilateral trade relations. Even though in its follow-up to the WCSDG report, the Commission does not seem to include a clear idea on how compliance with labour standards could be linked to bilateral trade flows, it does mention regional and bilateral agreements – and particularly the 'dialogue' mechanisms of these agreements – as an important tool to promote social rights in general. With this objective in mind, the Commission is committed to exploring 'new joint mechanisms' within bilateral agreements to keep track of developments with regard to the social dimension of globalization. In this monitoring exercise, international organizations such as the ILO would play an important role. As indicated above, specific commitments to promoting the relevant conventions of the ILO (covering the four CLS) figure in both the Cotonou Agreement and the Association Agreement with Chile.[21] The Cotonou Agreement even includes fundamental social rights in the Preamble and among the essential elements of the Agreement.[22] Yet, it seems that these provisions, as well as the 'social co-operation' chapters included in other agreements, still need to be fully exploited.

The EU's increasing emphasis on the role the ILO can play with regard to the relationship between trade and labour standards is also visible in one of the EU's most important unilateral trade instruments: the GSP. Since 2001, the legal basis of the social GSP clause, both the punitive and the incentive dimensions, has been extended to all eight ILO fundamental conventions. In addition, it was stated that, henceforth, the ILO's activities – 'available assessments, comments, decisions, recommendations and conclusions of the various supervisory bodies of the ILO' – will serve as a point of departure for granting or withdrawing tariffs.[23] To a large extent, this increased emphasis on the ILO in GSP regulations is reflected in the Union's policy practice of granting and withdrawing trade preferences (see Orbie and Tortell 2009). As for the GSP sanction clause, there is an almost exact consistency between European sanctions and ILO condemnations. For example, EU reports on Belarus clearly refer to the ILO fact-finding process, the conclusions reached and even the recommendations made. Nevertheless, there is no sharp division of labour between the ILO's role as a fact-finder and the EU's role to make political decisions based on these assessments. Up to now, the EU's conclusions have been in line with the work in the ILO – but it keeps its options open.

As for the social GSP incentives, there is a suggestion that the inclusion of the ILO core conventions as a requirement for the application of tariff incentives has had a real and measurable effect on ratification (e.g. in Venezuela, Mongolia and El Salvador). Nevertheless, while there seems to be a positive correlation between the *ratification* of conventions and the application of incentives, so that no country currently holds a GSP-plus tariff incentive without having ratified all eight fundamental ILO conventions, there is no corresponding correlation between the tariff incentive and *implementation* of the conventions. In fact, in many of the cases in which incentives have been granted by the EU, criticism by ILO Committees of those countries' implementation has been vigorous (e.g. Colombia).

Thus, although the GSP-plus system may have spurred on countries such as El Salvador to ratify all the CLS, it appears that the EU looks mainly at the

ratification record, rather than at the implementation of CLS. Therefore, the new GSP basically boils down to a continuation of the former drugs incentive system – albeit in a more objective way.[24]

Conclusions

Although the European Union has taken several initiatives to advance core labour standards in its multilateral, bilateral and unilateral trade policies, its success in this regard has been limited. Moreover, we found that the EU could not easily reach a common position on a social clause, and that at times its international stance has been cautious and ambiguous. Four explanations were suggested for the Union's difficulties in acting as a normative power *through* trade – despite its considerable power *in* trade.

The first reason concerns the ideological dispositions among member state governments about the need for enforceable labour standards in trade relations. The second one concerns member state sensitivities about possibly creeping EU competences in the field of labour regulation. The third reason covers the *relatively* low level of preference intensities among member state governments as regards the necessity to include enforceable labour standards in trade agreements and to invest political capital for that purpose, and the role of political party interest aggregation in this. The last reason refers to the increased attractiveness of the ILO for labour standard regulation at the international level, which diminishes the necessity to import them into the WTO legal regime or in bilateral trade agreements.

The chapter has also illustrated the influence of external context, such as resistance by developing countries, and the institutional mandate of the WTO. But one main finding of this chapter is that preferences among EU member state governments continue to have an important influence on Europe's international policies on promoting labour standards. This is even the case in trade, which is the EU's common external policy *par excellence*. Most accounts of Union trade politics either ignore the preferences of the member state principals or stick to the basic division between protectionist and liberal member states. However, research into the EU's 'new' trade agenda also warrants a more detailed analysis of the establishment and influence of member state preferences, and the extent to which these may evolve

Notes

1 See, for example, proposals for GSP reform (European Commission 1994); the market access strategy (European Commission 1996a: 17–18); Sir Leon Brittan's interventions in the EP (answer on Written Question E-0794/96, 3 April 1996); and the European Commission (1996b) communication on labour standards in trade.

2 See, for instance, the provision in the Stabilization and Association Agreement with Croatia (SAA Croatia, Article 91) or the Euro-Mediterranean Agreement with Algeria (EMAA Algeria, Article 67). The EMMAs also contain articles with provisions similar to GATT Article XX (Grynberg and Qalo 2006: 643).

3 Article 44 of the EU–Chile Association Agreement, Article 50 of the Cotonou Agreement. Note that the EU–Mexico Agreement does not include this type of reference, despite enduring union pressure. Some argue that the EU did not want to invest any negotiation capital in this as Mexico was already a party to the North American Agreement on Labor Cooperation (NAALC), the labour side agreement of the North American Free Trade Agreement NAFTA (Interview with Gerard Karlshausen, CNCD, 11.11.11. seminar, 21 September 2006).
4 More specifically, it concerns the incorporation in their domestic legislation of 'the substance of the standards laid down' in ILO Convention Nos. 87 and 98 (right to organize and to bargain collectively) and Convention No. 138 (minimum age) (see Article 11 of Regulation No. 2820/98 of 21 December 1998, OJ L 357).
5 Article 14 of Regulation No. 2501/2001 of 10 December 2001, OJ L 346/1.
6 See Gareth Steel (DG Trade) in Session 2 on 'Social dimension of EU trade policies', Transcripts of Open Forum and Debate on 'The European Union and the Social Dimension of Globalisation', Ghent, 22 November 2007. Available at http://www.eu-sdg.ugent.be (accessed 1 March 2008).
7 Article 50.3, Cotonou Agreement.
8 See in this respect para. 72 of the 'European Consensus on Development' (EU 2006).
9 Deutscher Bundestag, Plenarprotokoll 13/146 (13. Wahlperiode, 146. Sitzung), 6 December 1996, pp. 13230–44.
10 See House of Commons, Official Report, Debate of 17 December 1996, Column 760.
11 This Union stance, included in the EU negotiation mandate for a new trade round, basically repeated the Commission's argument for an ILO–WTO working group (Council 1999).
12 Cf. *Agence Europe*, No. 7571, 13 October 1999, p. 12. Note that other countries also sought the creation of a working group on labour standards and trade in the WTO, albeit less strongly than Germany. These countries were France and Sweden and, to a lesser extent, Denmark, Portugal, Luxembourg and Finland (EU Council President at that time). See *Inside U.S. Trade*, 9 October 1999.
13 The outcome of the Doha Ministerial Conference was basically a reaffirmation of the Singapore Ministerial Conference conclusions on the topic and thus, from the point of view of the member states that wanted to go further, a standstill. See Doha Ministerial Declaration, para. 8. It is significant that no reference was made to 'social development' in the declaration, something some EU member states – among them Germany – had tried to include. A final attempt by the Commission during the Doha Ministerial to incorporate stronger language on labour standards failed. In particular, the Commission targeted the last sentence of para. 8 of the draft declaration, which read as follows: 'The ILO provides the appropriate forum for a substantive dialogue on various aspects of [internationally recognized core labour standards]'. The Commission wanted to add 'to which the WTO, within its arm of competence, should contribute'. Owing to opposition from developing countries to any reference to labour standards in the declaration – particularly from India and Pakistan – the entire last sentence was deleted. Ultimately, this deletion was part of the price the EU had to pay for developing country acceptance of negotiations on the relationship between trade obligations in multilateral environmental agreements, on the one hand, and WTO rules, on the other.
14 British opposition was supported by the Netherlands, Ireland, Spain and Greece.
15 Cf. House of Commons, Official Report, 17 November 1999 (debates), column 73; 7 December 1999 (debates), column 302; 8 December 1999 (oral answers to questions), columns 811–13; 7 November 2001 (debates), columns 256–68; 15 November 2001 (debates), columns 997–1008.
16 See *Agence Europe Documents*, 29 July 1999.
17 *Agence Europe*, 23 October 1999.
18 Statement by the UK, Denmark, Germany, France and the Netherlands (Council 1994: 20).

19 For example, this concerns ACP countries under the Lomé/Cotonou Agreements; countries that concluded a bilateral trade agreement with the EU, such as Mexico, Chile and South Africa; beneficiaries of the GSP drugs regime (Latin American countries); and EBA beneficiaries (the least developed countries). These trade schemes reduce or nullify the attractiveness of requesting additional trade preferences based on compliance with CLS.

20 Consultations were held, in the framework of Article 96 of the Cotonou Agreement, with countries such as Zimbabwe and Togo, where the EU particularly condemned electoral fraud and the violations of the rule of law in these countries (see *Agence Europe*, 29 January 2007, 16 November 2006).

21 Article 44, EU–Chile Association Agreement ; Article 50, Cotonou Agreement.

22 In the Preamble of the Cotonou Agreement, both the EU and the ACP countries express being 'anxious to respect *basic labour rights*, taking account of the principles laid down in the relevant conventions of the ILO'. Article 9 of the Cotonou Agreement, including both the essential and the fundamental elements, states that: 'the Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural'.

23 Council Regulation No. 2501/2001 of 10 December 2001, OJ L 346, cons 19.

24 Besides the former drugs beneficiaries, Georgia, Moldova and Sri Lanka also receive GSP-plus references.

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10 The European corporate social responsibility strategy

A pole of excellence?

Olga Martin-Ortega and Muzaffer Eroglu

Introduction

The European Union (EU) is strengthening its corporate social responsibility (CSR) strategy in the framework of Europe's contribution to the social dimension of globalization. This chapter analyses the origins and development of the EU's approach within the context of the international discourse on corporate responsibility in relation to human rights and the environment. It focuses on the international dimension of the Union's CSR strategy, considering some of the measures undertaken in recent years and options for the development of tools to make European companies accountable for their activities abroad. It considers, in particular, the impact that such development and the choices made by the EU when designing its strategy may have on its achievement of the wider goal of becoming a pole of excellence for CSR.

Legal accountability and corporate social responsibility

Interest in the regulation of the activities of corporations, in particular multinational enterprises, is not new (Ratner 2001). These attempts have been reviewed in the context of globalization, and attention to the impact of their activities and working methods as regards human rights and protection of the environment today constitutes part of the search for the definition and development of a 'social dimension of globalization'.

The issue of business and social responsibility has begun to be considered as part of the social discourse on the negative dynamics of globalization during the last two decades. International scrutiny of companies' activities and the way they exercised power led to the uncovering of certain practices that were inconsistent with human rights, in some cases, and in clear violation of such rights, in others. High-profile examples range from the use of child labour and forced labour conditions in the textile industry in South-East Asia to complicity with human rights violations, such as torture, forced disappearance and extrajudicial killings, in mining, in places such as Myanmar or Nigeria.[1] A strong civil society movement developed around the premise that the economic discourse cannot remain separate from the concepts of respect, protection and the promotion of

human rights (Sabapathy 2005: 242). The debate on how to make corporations accountable under this premise grew quickly, securing a place in international institutional agendas.

Social demand for accountability mechanisms has developed in parallel with a corporate reassessment of their social role and duties as corporate citizens. In this process, the development of legal structures and mechanisms has advanced at a much slower pace and has encountered much more opposition than social and corporate developments. In a way, the array of initiatives now under the umbrella of so-called corporate social responsibility has proliferated as a response to, or even a substitute for, unsatisfactory or non-existent legal liability in this area, at both national and international level (Dine 2005: 222–25).

At the international level, international law has not yet provided a functioning framework for the protection of human rights, as regards the direct action or involvement of corporations. International law norms are mainly addressed to states, which have the capacity to accept and comply with obligations. Corporations, like other non-state actors, cannot legally assume international human rights obligations as they lack international legal personality. Therefore, these norms cannot be enforced directly against them before any international jurisdictional body.

At the national level, the very designs of company laws and structures have contributed to the lack of legal accountability for certain corporate actions. The fact that, under company law, shareholders and companies are separate entities, and the lack of direct liability on the part of parent companies for the actions of their subsidiaries or suppliers (see generally Muchlinski 2007; Eroglu 2008), demonstrates the obstacles in the way of accountability of corporations involved in human rights abuses.

As a consequence of this difficulty in establishing the legal accountability of enterprises, because of these complexities in national and international law, a robust body of initiatives has developed to ensure responsibility that is, at the least, moral: this is 'corporate social responsibility'.[2] CSR expresses a commitment towards society that goes beyond a respect for human rights, from traditional corporate governance elements, such as information disclosure and fair market practices, to include contributions to sustainability. Therefore, strictly speaking, CSR is not the same as corporate accountability for human rights and environmental wrongdoing. CSR stands for the cluster of activities – from codes of conduct, social and environmental reporting, labelling and certification schemes and partnerships to social investment indexes – from different origins, but assumed voluntarily by corporate actors in order to respond to a moral social demand without compromising liability.

On account of corporations' lack of direct liability, the broader CSR scheme has been considered as a tool to prevent breaches of human rights (McBarnet and Kurkchiyan 2007: 59). However, so far, CSR has been considered, inherently, as a commitment to go beyond legal obligations. It also includes a wider variety of actors or 'stakeholders' engaged in the business relationship: the state, the enterprise, the consumer and worker, and the wider social community. In this sense,

CSR presents itself as being flexible enough to cover different sorts of enterprises, stakeholders, activities and relationships in the widest possible framework (McBarnet 2007: 11); and it contributes to better social performance, although doubts are raised about its benefits as a human rights accountability mechanism (Conley and Williams 2005; McLeay 2006: 233–36).

International approaches to CSR: the binding versus voluntary debate

During the 1990s and the beginning of the twenty-first century, CSR initiatives proliferated at an increasing rate, coming from very different organizations with different social and political agendas. This led to important disparities when defining the concept and fundamental elements of CSR, as well as a wide range of terminology. In many instances, terms that encapsulate different concepts are being used as synonyms, such as corporate responsibility, corporate accountability, corporate citizenship and corporate sustainability (Morgera 2004; Conley and Williams 2005: 1), each of which could 'mean anything to anyone' (Addo 1999: 13).

In this context, the relationship between international and national legal developments and CSR is both complicated and dynamic. Until recently, the main focus here has been on the tension between voluntary versus binding approaches towards companies' responsibilities. Such tension confronts those in favour of the self-limitation of corporate behaviour in order to comply with socially demanded responsibility and those who believe that, as 'organs of society' (Henkin 1999; Weissbrodt and Krugger 2003, 2005), corporations have a legal responsibility towards human rights and call for legally binding standards with enforceable consequences for non-compliance.

Advocates of voluntary self-regulation of business activities in relation to human rights and the environment claim that, as a voluntary-based approach, CSR has an important role to play in creating a culture of values and compliance with already existing standards (McBarnet 2007: 47–50). The very existence of voluntary initiatives has been used to oppose efforts to develop legally binding instruments in this area and, on occasion, to attack normative initiatives on the basis that they discourage the responsible conduct of business that would avoid assuming any commitment that may lead to legal accountability (International Chamber of Commerce and International Organisation of Employers 2003). Discourses opposing legal developments have been based on rhetorical arguments that they would lead to a cutback in the responsibilities that companies currently take voluntarily (ibid.), and that the concept of corporate responsibility remains vague and has not proved sufficiently coherent to be legislated for (Sabapathy 2005: 252).

Emphasis on the separation between legal regulation and CSR, and its preference over a voluntary approach, has mainly come from business entities and organizations (Zerk 2006: 30), which have lobbied strongly for them at both national and international level, as well as within the EU, and influenced the definition of corporate responsibility in such terms.

The opposing argument is based on concern over the development of a concept of corporate responsibility based on self-regulation, in which companies themselves decide the content and scope of their obligations by defining their standards, implementation, monitoring and sanctioning systems (McBarnet 2007: 28), resulting in important impediments to accountability (Shamir 2004). In the main, these self-designed initiatives, which are generally ambiguous in their content and definition of the scope of obligations, settle for the minimum standards, ignoring those internationally agreed standards that define human rights (De Schutter 2005: 308; Martin-Ortega and Wallace 2005; Martin-Ortega 2006).

Non-governmental organizations (NGOs) have generally aligned themselves with this side of the debate, being wary of the growth of voluntary-based instruments and advocating legally binding standards (International Council for Human Rights Policy 2002; Amnesty International 2004), and even preparing the ground for their development (Bennett and Burley 2005: 372; Sullivan 2005: 286).

This binding versus voluntary dichotomy has also impacted on the development or review of international initiatives at the intergovernmental level. Generally, governments of capital-exporting states have been reluctant to take steps that could harm international competitiveness (Zerk 2006: 7), avoiding normative burdens over nationally based businesses. Equally, capital-importing countries have avoided creating obstacles to foreign direct investment by removing corporate obligations in their territory (Sabapathy 2005: 239).

At an intergovernmental level, the main instruments establishing those standards directly addressed to companies are the Organization for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises (1976, reviewed 2000) and the International Labour Organization Tripartite Declaration on Multinational Enterprises and Social Policy (1977, reviewed 2000). They are voluntary by nature and represent a soft law approach to business responsibilities, having become the most authoritative instruments in terms of the definition of labour standards for companies in international law (Clapham and Martignoni 2006: 296).

At the United Nations (UN) level, the paramount tool is the UN Global Compact, launched by the Secretary General in 1999 as an invitation for business to endorse UN goals. It comprises ten principles on human rights, labour rights, the environment and anti-corruption, which businesses commit to incorporating into their practices. It is conceived of as a *learning network* (Ruggie 2001) rather than as a legally binding instrument (ibid., 371); it does not try to impose obligations on corporations or to evaluate the particular actions of companies (Global Compact Office 2003).

Initiatives have also been taken to provide a binding legal framework on human rights for corporations. The most ambitious attempt – the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights of the Sub-commission on the Promotion and Protection of Human Rights (2003) – proposed an innovative approach in international law applying standards directly addressed to companies in an attempt to impose internationally binding human rights norms on business (Weissbrodt and Krugger 2003, 2005; Wallace and Martin-Ortega 2004). This initiative is now considered to have failed

(Gelfand 2006; Kinley *et al.* 2007), even by the UN Secretary-General Special Representative on the Issue of Transnational Corporations and Other Business Enterprises (2006: paras 59–60).

Finally, it is worth mentioning how some hybrid initiatives promoted by certain states are proving particularly successful and opening up interesting avenues for co-operation in the prevention of human rights abuses in specific areas. Examples include the Kimberley Process for certification of rough diamonds and the Voluntary Principles on Security and Human Rights.

Beyond the dichotomy

There is now a consensus that corporations bear certain social responsibility so, as Zerk (2006: 299) stated, the question now is *how* corporations should be made responsible rather than *why*. However, the discourse and creation of instruments of social responsibility for companies in the opposing terms of binding versus voluntary have simply contributed to a fragmented set of norms and mechanisms that does not provide an adequate framework for the prevention and sanction of corporate abuses of human rights.

In order to overcome this stagnating dichotomy, it becomes necessary to look beyond binding norms and voluntary options as closed categories, and to consider the potential for interaction. In this sense, a 'third way' for CSR regulation has been suggested (MacLeod 2007: 676–77). This third way, or simply an effective framework, should be based on a combination of legal obligations and voluntary contributions from business.

Therefore, both approaches – the promotion of corporate awareness and the development of normative frameworks – should be complementary as they fulfil different functions. First, the legally based instruments establish the framework for company behaviour and define the practices to be considered as abuses of human rights and the environment. Next, voluntary commitments enable companies to assume obligations that would enhance their position as corporate citizens and benefit the wider community. Both sets of standards fulfil a business function of social responsibility as part of the social dimension of globalization: on the one hand, the prevention and sanction of business participation in human rights abuses and, on the other hand, the development of the positive role that businesses can play in the promotion and protection of human rights.

In this sense, the regulation of those business activities that might impact on the enjoyment of human rights requires this combination of hard law, soft law and voluntary contribution by all the stakeholders involved. Hard law is necessary to provide the minimum standards, compliance with which is not an option. Soft law creates a framework that provides platforms on which to advance the issues and mechanisms that make voluntary adhesion to them more attractive. And finally, voluntary initiatives allow their participants to distinguish themselves in terms of market performance. They impact on the development of soft law instruments by demanding further frameworks for action and on hard law by contributing to the creation of a common consensus over the applicable law.

There are minimal common hard law standards that should serve as a starting point: states have an internationally legally binding obligation to respect, promote and protect human rights, including protecting individuals from third-party intrusions into their rights, which also covers corporate actors (Clapham 2006; UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 2007). The fulfilment of state obligations to offer protection from the violation of human rights in which corporate actors participate implies a duty to create the necessary mechanisms of guarantee and sanction. In this respect, within the EU framework, it is not only EU member states that are bound by such international legal obligations, but the Union itself is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (Article 6.1, EU Treaty), and has assumed an obligation to respect fundamental rights as general principles of Community law (Article 6.2). Therefore, the EU not only represents the right forum in which to develop an adequate framework for corporate responsibility, but should also show a commitment to fully uphold human rights in this sphere.

De Schutter (2006: 2) argued that the question today is how to ensure consistency between the different initiatives to improve corporations' human rights accountability, and whether the time is ripe for a more ambitious development. A question that can be asked of the EU is whether it has the capacity do provide such a framework that can ensure consistency in the development of business responsibilities, and whether it is time for it to lead more ambitious steps in this respect.

The European framework of corporate social responsibility

The legal order of the European Community offers a number of possibilities that are hard to envisage within the circumstance of other multilateral organizations in order to define the private sector's responsibilities for social issues, including human rights and the protection of the environment. Unique legal instruments can bind both natural and legal persons, including states and corporations, creating rights directly enforceable before the national courts of EU member states (Clapham and Martignoni 2006: 296). However, these advantages have not proved to be of major benefit as the binding versus voluntary tension has informed, and so far eclipsed, the debate and the development of the EU strategy, making it difficult to advance into the definition of specific standards and implementation mechanisms within the European framework.

The EU has developed its approach by defining its own strategy on CSR, independent of other institutions that had already developed tools in this field. It has, however, constantly demonstrated its support for initiatives such as those already mentioned from the OECD, ILO, the UN Secretary General's Global Compact and, most recently, the Kimberley Process certification scheme for international trade in rough diamonds, by assuming its chairmanship in 2007. It has also developed other areas that provide interesting instruments to be considered in the matter in hand, at both the internal and the external level.

The EU corporate social responsibility strategy: origins and defining elements

The EU CSR strategy originated in the context of a global trend to give a particular role to the private sector in global governance and the responses to the challenges posed by economic globalization. For example, at the global level, the United Nations, in its Millennium Declaration (2000), was calling for the inclusion of civil society and the private sector in activities related to the organization's objectives, such as development and the eradication of poverty, as well as suggesting a wider contribution to the strengthening of the organization itself (paras 20 and 30).

The EU's interest in the matter has evolved since 1999, when the European Parliament (EP) made the first call for the adoption of a 'European Code of Conduct for European enterprises operating in developing countries' (European Parliament 1999). In its resolution, following the so-called Howitt Report (European Parliament 1998), the EP urged the European Commission and the Council to develop the right legal basis for establishing a European multilateral framework governing companies' operations worldwide, as well as improving the monitoring of European companies' activities in third countries. The EP's initial approach involved combining both voluntary and binding models for the enhancement and control of corporate activities abroad. This was referred to as an 'evolutionary approach' to the question of standard setting for European enterprises (European Parliament 1999: 10).

However, by taking the lead in defining the EU strategy on CSR, the Commission separated itself from the enthusiasm for binding standards shown by the EP and relied heavily on a voluntary approach. The bases of this strategy were set out in two documents: the Green Paper 'Promoting a European Framework for Corporate Social Responsibility' (European Commission 2001a), and the Communication 'Corporate Social Responsibility: A business contribution to sustainable development' (European Commission 2002).

The fundamentals of the CSR concept adopted by the Commission in these documents, which have remained constant ever since, were: a voluntary, business-based, strategy consisting of the integration by companies of 'social and environmental concerns in their business operations and their interactions with their stakeholders'. The Green Paper (European Commission 2001a) also addressed the external dimension of CSR and brought to the agenda consideration of the EU's role as a global actor in relation to this matter, which is analysed further below.

The Green Paper launched a consultation process in which all relevant actors were asked to express their 'views on how to build a partnership for the development of a new framework for the promotion of corporate social responsibility' (European Commission 2001a: para. 20). This marked the starting point of developing the EU CSR strategy which relied heavily on voluntarism. The Green Paper focused intensely on the business case for CSR, elaborating extensively on the advantages that contributing to social and environmental goals has for businesses themselves as well as for the wider community. Therefore, this could be

considered to be a successful outcome for business organizations in their effort to turn the EU CSR strategy towards favouring voluntary schemes. The Green Paper hardly considered issues that had become increasingly important to the public, related to corporate misbehaviour and the negative impact of the activities of corporations and certain working methods used by some of them in the context of the global economy.

This initiative was a success in terms of opening the debate and including all sorts of relevant actors, and in creating a healthy environment for future developments (McBarnet 2007: 47). The invitation to participate in defining the strategy attracted a great number of companies, employers' organizations, coalitions of NGOs, trade unions and academics. As expected, the responses of the NGOs and the trade union community indicated that they were not keen on the voluntary approach, while the business sector devoted its efforts and enthusiasm to enhancing this approach as a core element of the developing strategy (Voiculescu 2007: 378).

The European Commission (2002) then went on to confirm the principles for Community action in relation to CSR: recognition of its voluntary nature; need for credibility and transparency of CSR practices; focus on those activities where Community involvement adds value; a balanced and all-encompassing approach to CSR, including economic, social and environmental issues as well as consumer interests; attention to the needs and characteristics of small and medium-sized enterprises (SMEs); and support and compatibility with existing international agreements and instruments, such as the ILO core labour standards and the OECD Guidelines on Multinational Enterprises.

During the initial phase of the CSR strategy, the importance of maintaining a comprehensive approach and developing a strategy intimately connected with other EU policies and priorities was stressed, along with an understanding of the impact that the Union's position on this matter would have in response to the challenges of globalization both internally and as a global actor. In this respect, the European Commission (2002) committed to further promoting the integration of CSR principles into EU policies. The policies linked with the establishment of a CSR strategy were considered to be: employment and social affairs policy, enterprise policy, environmental policy, consumer policy, public procurement policy and public administration, at the internal level, and external relations policy, including development policy and trade, at the external one (European Commission 2002: 18).

In order to develop the strategy, the European Commission organized what was called the European MultiStakeholder Forum (EMSF) on CSR in October 2002. The forum was composed of EU-level representatives of what were seen as all interested stakeholders, including representatives of the European Commission and other EU institutions. The forum's work was published in a final report on 29 June 2004, which contains mainly case studies and recommendations on how to raise awareness and improve knowledge of CSR, and develop the capacities and competences to help mainstream CSR and ensure an enabling environment for it. It assumed the Commission's definition of CSR and insisted on it being

commitments undertaken over and above legal requirements and contractual obligations. Thus, at this stage, the binding versus voluntary question remained constant. As MacLeod (2007: 684) has pointed out, the result of the forum 'failed to move the EU away from the binary approach to CSR, the idea that voluntary and other regulatory approaches are opposed and cannot be reconciled'.

During this evolution, the tension between the Commission and the Parliament was evident. The EP consistently advocated for a better suited regulatory system for CSR (Voiculescu 2007: 378, 383) and repeatedly demanded the right legal basis be developed for a multilateral framework for European companies' operations worldwide (European Parliament 2002: para. 25), under the conviction of the existence of 'a clear basis in international law for extending obligations on companies to respect human rights' (para. 46). Notwithstanding the benefits of a voluntary approach, the EP has been firm in its assertions that 'companies should be required to contribute to a cleaner environment by law rather than solely on a voluntary basis' (European Parliament 2003: para. 5).

Following the issuing of the EMSF report (2004), the process ground to a standstill until recently, when it has received an impetus as part of the revision of the Lisbon objectives and the definition of the EU's contribution to the social dimension of globalization. This placed CSR as a shared interest between different areas of competence, now being developed mainly by the Directorate General of Enterprise and Industry, the Directorate General of Trade, the Directorate General of Employment, Social Affairs and Equal Opportunities and, increasingly, the Directorate General of Development and Relations with Africa, Caribbean and Pacific States.

The next steps: the European Alliance for CSR

In 2006, the European Commission (2006a) assumed the objective of making Europe 'a pole of excellence' on CRS as part of its objectives for growth and jobs. Once again, the main elements of this strategy are stressed as voluntary and multiparticipatory in its implementation. Companies, employees and their representatives and trade unions, external stakeholders, including NGOs, consumers and investors, and public authorities are requested to 'further improve the consistency of their polices in support of sustainable development, economic growth and job creation' (European Commission 2006a: 5).

In order to stimulate this excellence in CSR, in March 2006, the Commission launched the 'European Alliance for CSR'. This new initiative has been conceived as a partnership open to all those enterprises that share the goal of making Europe a pole of excellence on CSR in support of a competitive and sustainable enterprise and market economy. According to the Commission, the Alliance is built upon an understanding that CSR can contribute to sustainable development while enhancing Europe's innovative potential and competitiveness. Therefore, in theory, it foresees it contributing to both employability and job creation within the EU and to the goal of enhancing Europe's contribution to the social dimension of globalization.

The Alliance has been designed and launched in a business language. The main areas of activity are identified as: raising awareness and improving knowledge on CSR and reporting; helping to mainstream and develop open coalitions and co-operation; and ensuring an enabling environment for CSR. The rationale behind its launch is the same as that of other ongoing initiatives, such as that of the UN Secretary General's Global Compact: the creation of exchange, dialogue and learning networks, and promotion of CSR as a business opportunity to contribute to society. It is described by the Commission as a 'political umbrella for new or existing CRS initiatives by large companies, SMEs and their stakeholders' (European Commission 2006a: 6). It is explicitly 'a non-legal instrument', and there are no formal requirements for declaring support for the Alliance, to the extent that it is not to be signed by enterprises, the Commission or any public authority. The Commission has reinforced the business community by stating that it will not keep a list of companies that support it.

The NGO community has expressed its discontent with the way the Alliance has been designed and the lack of inclusiveness the Commission has shown in taking the next step in the development of the CSR strategy. The European Coalition for Corporate Justice (ECCJ), which brings together several relevant NGOs at the European level in the field, has complained that the Alliance has been developed without any involvement of stakeholders other than business, and has claimed that it is being used as a public relations tool, failing to comply with the main elements required for the credibility of CSR initiatives, such as the level of standards and commitment, the involvement of stakeholders, transparency and quality of monitoring and independent verification (ECCJ 2006).

The Alliance is in its very initial stage, but the focus on business methods and language, the limited management through the Directorate General for Enterprise and Industry and the excessive care taken over not being identified as a normative instrument pose certain doubts over its capacity to project at the global level and to make a difference as regards existing voluntary schemes. Additionally, it certainly raises doubts with regard to the EU's capacity to offer alternatives beyond the binding versus voluntary dialectic.

One positive impact of developing the EU CSR discourse has been that it has contributed to opening the debate at both European and national levels. Most national governments have embraced CSR and made developments in this area (European Commission 2007), mainly in the form of raising and promoting CSR issues and creating codes of conduct initiatives with private partners and social reporting and, among some of them, by actively promoting international instruments (Voiculescu 2007: 369). Member states have also tended to prefer a voluntary approach as a basic tool to make corporations socially responsible (Albareda *et al.* 2007).

The international dimension of the EU strategy on CSR

Consideration of the impact that European companies' activities have outside the EU is particularly important as the Union is home to the majority of the biggest

companies operating in global trade (UNCTAD 2007), accounting for one-fifth of world trade (European Commission 2006b: 2).

From the beginning, the EU's CSR strategy has developed as closely linked to the activity of other international institutions' responses to economic globalisation, such as the OECD, ILO and UN. However, more recently, the EU has clearly adopted it as one of the instruments aiming to make a contribution to the social dimension of globalization at the international level. The inclusion of CSR considerations in external policies is part of developing the EU's aim to use its position in international relations and global trade to promote human rights and democratization (European Commission 2001b; 2001d). As described in Chapter 1, the inclusion of CSR objectives within the social dimension of globalization is part of the trend initiated by the EU since 2001 to widen the definition of the social objectives pursued and the recurrence of soft and development-related instruments to achieve this.

The external dimension of CSR was first considered by the EP (1999), which focused on the activities of European companies in developing countries. It has been developed mainly by the Commission, which first insisted on the business case for a better performance abroad (2001a), and then considered it among policies already initiated and developed that were relevant to its commitment to promote both economic progress and social cohesion (European Commission 2004). And it specifically placed it in the context of the need to balance economic, social and environmental imperatives within its external relations policies. In this context, the CSR strategy is considered by the Commission as one of the tools in the achievement of a more equal and sustainable globalization at the international level, together with the Generalized System of Preferences (see Chapter 9), the Neighbourhood Policy (see Chapter 4) or the support of other regional integration procedures (European Commission 2004, paras 18–19).

Since then, the EU has remained consistent in its approach to inserting CSR considerations into external relation policies, in particular in trade and development. Even if many measures have been timid and recurrently framed in a language reflecting voluntarism, the EU has committed to developing a coherent strategy that could have a significant impact. This is why it is particularly noticeable that the Communication 'Europe in the world – some practical proposals for greater coherence, effectiveness and visibility' (European Commission 2006b) does not include any reference to social considerations with regard to carrying out business, when it addresses either trade and competitiveness or development.

Some of the initiatives in inserting CSR concerns into trade and development are considered below, as well as the options for corporations' accountability for human rights violations abroad. However, before that, the EU's support for the Kimberley initiative of setting up a system of certification and import and export controls for the international trade in rough diamonds, which it joined in 2002,[3] is worthy of a brief mention. In 2007, the EU strengthened this commitment by chairing the scheme and establishing a plan of action entitled 'From conflict diamonds to prosperity diamonds' (EC Chairmanship of the Kimberley Process 2007). This is important encouragement for this initiative, in particular, while the fact that the EU is ready to back this hybrid mechanism contributes to its legitimacy.

This exemplifies the relevance that any action taken by the EU has in this field as well as the importance of a coherent actuation in advancing the matter.

Inserting CSR considerations into trade and development co-operation policies

Both trade and development policies have provided attractive fora for the inclusion of CSR issues in the external action of the EU (European Commission 2002, 2004, 2006a), and both the Directorate General Trade and the Directorate General Development are now putting effort into developing CSR actions.

Activities in this area have focused on the goal of 'raising awareness' and covering this perspective in the international agenda. In this respect, the EU has included CSR as a topic for dialogue with developed and developing countries, and business and civil society in the framework of trade negotiations. Engagements in bilateral talks include those with the government of Bangladesh in 2006, which led to the establishment of a forum on social compliance as well as the enhancement of labour rights considerations in EU co-operation programmes (European MultiStakeholder Forum 2006), and with China, mainly through the Industrial Policy Dialogue between China's National Development Reform Commission and the Directorate General Trade, which has set up a programme of co-operation on CSR in the textile sector (ibid.).

But perhaps the most interesting advancements have taken place within development co-operation policy (Voiculescu 2007: 395). It would appear that development co-operation policy is the preferred means of promoting human rights and contributing to the social dimension of globalization (see Chapter 1), and presents itself as one of the most suitable areas for the inclusion of CSR. This has been the line followed by the Commission (2005a) when defining the policy coherence for development and placing of CSR as one of the elements of its co-operation policy, in particular as a contribution to sustainable development and poverty reduction.

In this context, the main advance has been in the context of development co-operation with ACP countries in the framework of the Cotonou Agreement. The Agreement, signed in 2000, included a reference to trade and labour standards (Article 50) and consideration of a greater involvement of the private sector as an element contributing to the maintenance and consolidation of a stable and democratic political environment (Article 10). It made no direct mention of the matter of businesses' responsibilities, but did include them as partners (Article 2), thereby shifting development co-operation from exclusively state-to-state to state-to-stakeholder interactions (Voiculescu 2007: 393). The inclusion of the human rights clause in the Agreement and, in particular, the possibility of suspending development co-operation aid, programmes and subsidies in the case of a recipient state failing to make human rights progress may prove to be a key development in this area. As has been highlighted (Voiculescu 2007: 386–92), the Cotonou Agreement has the potential for co-interesting governments and businesses in the promotion of human rights and socially responsible practices, opening the door to much greater business involvement in promoting human rights standards.

Voiculescu (2007: 392) has inferred that the Agreement opens the door to a two-way CSR–Cotonou reinforcement action: on the one hand, EU companies interested in becoming CSR champions will acquire an official outlet for action under the Cotonou human rights umbrella and, on the other hand, promoters of CSR can use the Agreement to compel compatible behaviour from companies and the development of an intergovernmental structure to maintain consistency with the Agreement's human rights and CSR agenda.

In the context of the EU's strategy for Africa, agreed with the African Union in December 2005, however, a direct reference to CSR was avoided when setting parameters for the promotion of foreign investment in Africa. Even if there are constant references to the need to develop investment in a sustainable way and to promote decent work, no consideration is given to the role of European companies in participating in such goals, or the role of the EU in avoiding corporate behaviour that would jeopardize them. It is interesting to note that, within the framework of the Union's strategy for Africa, an EU–Africa Business Forum has been established and has become an annual event following meetings in 2006 and 2007.[4] This forum has established a governance and CSR working group. During its first meeting, the group called for the creation of 'an African business network to promote, disseminate and exchange best practices on governance and CSR and to promote a better understanding of corporate responsibility initiatives in Africa among the wider public' (EU–Africa Business Forum 2006), and a dialogue seems to have started in this respect.

In the context of development co-operation and humanitarian aid, another interesting step taken by the EU in the inclusion of human rights considerations within company activity has been the insertion of specific requirements for tenderers who have being awarded contracts to perform Community external assistance activities funded by the EU budget. The Union has assumed the trend to use public procurement as a tool to consider when shaping the social responsibility of business (McRudden 2007: 93), even in contradiction to its prior position in the World Trade Organization (WTO) opposing the Massachusetts public procurement initiative against companies operating in Burma in 1998. The Regulation on Access to Community External Assistance[5] provides that all those performing such assistance, including legal persons, shall respect internationally agreed core labour standards (Article 10).[6] The Regulation does not detail the consequences of not complying with such a requirement. Nevertheless, this means a step forward as regards the stand taken in relation to regulating member states' public procurement,[7] which allows the use of non-economic criteria for the selection of the most advantageous tender, opening the door to inserting human rights considerations into public procurement contracts (Zeisel 2006: 369), although it does not refer to them explicitly.

It is rather early to assess the impact of these advances. Nevertheless, it is possible at this stage to acknowledge that CSR can play an important part in shaping a development strategy coherent with human rights, as it places such rights at the centre of the interests of companies when they are involved in economic activities backed by EU aid or EU-sponsored programmes. Equally, it promotes the interest

of recipient states towards more socially responsible companies, knowing that their business operations might be scrutinized by the Union.

Making companies accountable in the EU for human rights violations committed abroad

As the examples above show, development of the international dimension of the EU's strategy has focused mainly on the insertion of CSR considerations in pre-existing international relations tools that address states. Activities directly linked to the control of the behaviour of business itself have been restricted to awareness-raising activities and dialogue so far. However, the EU does have the instruments and the capacity to develop adequate norms to make those companies that are domiciled in a member state and participate in human rights abuses abroad accountable.

The European Commission (2001a) has insisted that, by adopting socially and environmentally responsible practice, all companies must respect the relevant rules of EU and national competition laws. However, the lack of clarity over which rules and how they apply leads to ambiguities that cannot resolve the contradiction of having a strong regulatory framework within the EU in relation to corporate social, labour and environmental practices that does not apply when the same companies carry out their activities in third countries. The human rights norms that apply within the EU framework do not apply extraterritorially, i.e., they do not impose obligations on companies to comply with internally established standards abroad. Accordingly, the international dimension of EU rules on human rights in this matter fall short because of jurisdictional barriers (De Schutter 2005). This is why, in order to apply these norms, tools such as those referred to below, which provide liability for activities abroad, are of such relevance.

The EU has the instruments and the capacity to challenge this extraterritoriality in relation to legal persons by developing adequate norms to make companies that are domiciled in a member state and participate in human rights abuses abroad accountable. On the one hand, the norms on civil jurisdiction within the Union have opened the door for companies' civil liability for human rights violations committed abroad. On the other hand, the EU has demanded the criminalization of legal persons involved in certain abuses. Both avenues are addressed in brief below.

Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters,[8] consolidating the 1968 European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters – the Brussels Convention – establishes that 'persons domiciled in a Member State, shall, whatever their nationality, be sued in the courts of that Member State' (Article 2.1). According to De Schutter (2005: 265), who qualifies this Regulation as a 'European Alien Tort Claims Act', the instrument recognizes jurisdiction for member states' courts to hear tort actions based on the damage caused by companies to human rights victims, wherever they are domiciled and whatever their nationality. This option was initially considered by the EP (1999: Preamble) and the Commission (2001a: para. 50),

but has since been abandoned, and there have been no more references to this possibility by the Commission or the Council. De Schutter (2005: 282) considers that this should not constitute an obstacle to the future development of corporate accountability.

Developments in relation to the criminalization of certain corporate activities have taken place mainly within the ambit of the prevention and punishment of human trafficking. The Council Framework Decision on 'Combating Trafficking in Human Beings'[9] establishes the obligation for states to take the necessary measures to ensure that legal persons can be liable for participating in transferring, harbouring, receiving and exchange or transfer control of human beings, and establishes that member states shall punish such acts effectively and proportionately, including through the imposition of criminal sanctions (Articles 4 and 5). Therefore, technically speaking, the EU has not encountered any difficulties in establishing legal consequences for companies' involvement in human rights abuses abroad.

Conclusions

The debate over the responsibilities of companies within the social dimension of globalization has moved forward from the mere recognition of the potential positive role of the private sector in achieving development and respect for human rights to acknowledging the need to provide a certain threshold below which it is not acceptable to do business. This threshold is the respect for human rights.

In order to draw up such a framework, two aspects should be considered. The first is the indispensable need for institutional support. In this regard, the call by the ILO World Commission on the Social Dimension of Globalization (WCSDG) to develop a coherent approach towards the involvement and commitment of the private sector in the social dimension of globalization (WCSDG 2004) requires a firmer institutional back-up. The EU is not only qualified to assume such a role, but its capacity to contribute to fulfilling its external goals depends, to a certain extent, on its determination to do so. Second, a clear distinction between CSR as a synonym of voluntary social commitment and the international protection of human rights is necessary to unblock both the debate and the immobility at international and European level. Further, an understanding that hard law, soft law and voluntary contributions are indispensable elements of an effective normative framework able to guarantee compliance with human rights is equally important. International protection of human rights, towards which all European member states have legal obligations, and which the EU made one of its main objectives, requires guaranteeing a system in which no actor has the capacity to participate in human rights abuses and remain unpunished. The duty of both member states and the EU itself to protect human rights goes beyond the promotion of good corporate behaviour to guarantee accountability.

Even if the international legal norms do not currently provide a clear framework for the control of the conduct of companies, they do identify the existing human rights standards relevant to such control. The EU has developed an ambiguous approach in this matter. On the one hand, the Alliance on CSR seems to have

followed a path that, while acknowledging the relevance of international legal standards, does not rely on them to draw its strategy and focuses on businesses' own contribution. On the other hand, the inclusion of CSR concerns within EU external relations, in particular its development policy, firmly rooted in these international standards and in the Union's commitment towards them, seems to be providing an interesting framework for human rights promotion in developing countries. Added to this is the possibility of going beyond this to impose civil liability on companies for torts committed abroad or even to criminalize and sanction certain activities in which they become involved. Both these options require further development.

Therefore, on the one hand, through the institutional backing of a business-focused definition of social responsibilities and its insistence on a solution involving voluntary contributions, the EU risks marginalizing the important issue of accountability for human rights and environmental violations. On the other hand, adherence to regimes such as the Kimberley Process or the design of systems promoting human rights within development policy that involve some sort of business participation triggers the potential for developing an effective framework where hard law, soft law and voluntary measures interact.

An overall evaluation of EU CSR initiatives indicates that voluntary and soft law approaches have been dominant and more determinant within the political agenda. From a legal perspective, failure to introduce binding legislation within the EU legal order that tackles violations of core human rights could mean that the Union will have a reduced range of options at the international level (Clapham and Martignoni 2006: 296). However, this analysis also reveals that there is potential for more dynamic relationships between these approaches and, as Voiculescu (2007: 286) has pointed out, even if voluntarism is consistently referred to as the basic approach to CSR, within the European context and as a consequence of recent developments, it lies 'in the vicinity of a subtle, potentially expanding normative regime'. It is dependent on the efforts invested in the development of this normative regime in which the EU has the potential not only to provide a 'pole of excellence' for CSR, but to lead an economic model that is effective while, at the same time, complying with human rights and environmental standards, i.e. adequate to provide a social response to globalization.

The launching of the Alliance for CSR (EU 2006) insisted that 'the delivery of this strategy is crucial for securing Europe's sustainable growth as much as the European way of life'. The next developments in the EU CSR strategy should aim to reinforce the idea that the European way of life does not stop at its borders by preventing European companies from doing abroad what is considered a violation of our rights and values at home.

Notes

1 These three cases prompted law suits in the United States under various pieces of legislation: for false or misleading public statements in the *Kasky v Nike* case (2002) and under the Alien Torts Claims Act in the *Doe v Unocal Corp.* (2002) and *Wiwa v Royal Dutch Petroleum Co.* (2002) cases.

2 The origins of CSR are often traced back to post-Second World War business initiatives in the US, as a combination of the principles of charity and stewardship. But it has been the development of the theory of stakeholders that has led to the modern conception of a corporate responsibility towards society (Kolk *et al.* 1999: 141).
3 Council Regulation No. 2368/2002 of 20 December 2002, OJ 2002 L 358/28.
4 The first EU–Africa Business Forum met in Brussels on 16–17 November 2006, and the second one in Accra (Ghana) on 21–22 June 2007.
5 Council Regulation No. 2110/2005 of 14 December 2005, OJ L 344.
6 The European Commission is currently negotiating with ACP partners to extend this obligation to contracts financed under the European Development Fund.
7 Directive 2004/18/EC of 31 March 2004, OJ L 134.
8 Council Regulation No. 44/2001 of 22 December 2000, OJ 2001 L 12/1.
9 Council Framework Decision 2002/629/JHA of 19 July 2002, OJ L 203/1.

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11 Lobbying the EU for gender-equal development

Petra Debusscher and Jacqui True

Among international organizations, the European Union (EU) stands out in its support for the goal of gender equality. The Lisbon Reform Treaty considers ‘equality between women and men’ among its values and objectives[1] and, since 1996, the EU has committed to mainstreaming gender considerations into all aspects of its operations and policies. But what impact has the EU model of gender equality, as it is diffused and expressed in its external development, aid, trade and human rights policies, had on the rest of the world? The Union is a powerful trade actor with the greatest market share of world trade in goods and services. The EU (Commission and member states) is also the world’s largest aid donor, providing 55 per cent of official development assistance globally. But to what extent have these external instruments been used to advance gender equality goals? Have EU gender equality norms served to humanize or transform EU development policies?

To date, much of the advocacy, scholarly and policy-relevant debate has focused on how the EU has developed internally as a ‘new kind of gender regime … with distinctive patterns of gender inequality’ (Walby 2004: 23). However, the implementation and impact of EU gender equality policies and norms in its external policies, such as development and trade, have received little critical scrutiny.

This chapter examines the efforts of transnational advocacy networks (TANs) to lobby the EU to address the differential impact of its international development policies on women and men. It consists of four main parts. First, the political context and evolution of gender mainstreaming initiatives in the Union are discussed. Second, the emergence and role of gender and development advocacy networks that aim to bring a gender perspective to bear on EU development policies will be explored. Third, consideration will be given to the geopolitical, institutional and financial factors that contribute to the limited implementation of gender mainstreaming in EU external policies, despite regional activism and the Union’s rhetorical commitments to mainstreaming a gender perspective across all its policy-making. ‘Gendersclerosis’, the term coined by Lister (2006), will be deployed to analyse the gap between the rhetoric and practice of EU gender mainstreaming. Finally, we suggest how a gender equity perspective on Union development policies might be further advanced by gender and development TANs in the current, challenging political and institutional environment.

Gender mainstreaming in the EU

The EU has made high-level political commitments to gender mainstreaming since 1995. It leveraged global developments after the Beijing United Nations (UN) Conference on Women to pursue a new strategic focus on mainstreaming gender perspectives in policy development, implementation and monitoring. Mainstreaming seeks to move beyond equal rights and equal opportunity approaches that treat masculine structures as the norm, and the equality of women and men as an optional add-on to existing policy objectives and outcomes. In the EU, gender mainstreaming is defined as the 'promot[ion of] equality between women and men in all activities and policies at all levels' (European Commission 1996). Mainstreaming demands that all policies take into account their potential impact on women and men, redressing any negative or unequal impacts. According to the Commission, this does not replace positive action but complements it. Together, these two strategies form the EU's 'dual-track approach' to achieving gender equality.[2] Gender equality is seen as 'a fundamental right, a common value of the EU, and a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion' in the Amsterdam Treaty and the Lisbon Strategy (European Commission 2006).

The mainstreaming concept first emerged in the EU in the context of external development policy in the 1990s, expressed as 'the integration of women across policies' in a groundbreaking resolution in 1995 (European Commission 1995). In its resolution, the EU Council of Ministers recognized that 'reducing existing gender disparities is a crucial issue in development', and called for mainstreaming gender analysis in development co-operation activities (Council 1995). Gender mainstreaming was extended to all areas of EU internal and external policy in 1996, although it has been most comprehensively implemented in internal policies (European Commission 1996).

Within the European Commission, competency in gender policy analysis varies greatly across the respective policy areas organized in Directorates General (DGs) (Elgström 2000; Hafner-Burton and Pollack 2002). The EU has made substantial efforts to implement gender mainstreaming in its internal policies, especially with respect to employment and labour market policies. Among the external DGs, however, policy competency and receptiveness to gender mainstreaming diverges considerably. No EU trade body, most importantly the European Commission's Directorate General for Trade, has given much attention to gender inequalities (Hoskyns 2008). In contrast, the Commission's Development DG has issued a string of relevant policy statements, resolutions and communications on gender and development since the first resolution in 1995.[3]

The 2006 European Consensus on Development, jointly agreed by the Council, the European Parliament and the Commission, includes forceful language on gender equality intended to guide the actions of both the European Community and its member states (EU 2006). Most recently, the 2007 Communication on Gender Equality and Women's Empowerment in Development Co-operation aims to increase the *efficiency* of gender mainstreaming and to refocus specific actions for women's

empowerment, providing forty-one concrete suggestions in the areas of governance, employment, education, health and domestic violence (European Commission 2007). Guided by these significant political commitments to gender equality, DG Development and EuropeAid have institutionalized mainstreaming methodologies and gender equality principles across their policy and operational work.[4]

Much has been achieved with respect to the development of gender equality norms and their adoption in EU political commitments to promoting a gender perspective in external policy. Transnational advocacy networks that include gender specialists, development non-governmental organizations (NGOs) and grassroots movements dedicated to achieving gender equality or advancing women's rights have been crucial in this norm-creating process. The next section looks more closely at gender and development advocacy networks and how they have engaged with and sought to influence the implementation of gender equality norms in EU international development policies.

Gender and development advocacy networks in the EU

Networking for gender-equal development

Transnational advocacy networks (TANs) comprise activists inside and outside governmental institutions bound by 'shared values, a common discourse, and dense exchanges of information and services' (Keck and Sikkink 1998).[5] They are 'most prevalent in issue areas characterized by high value content and informational uncertainty' (ibid.: 2). The European gender and development circuit is a TAN consisting of gender advocates and organizations from many EU member states which, in addition, have alliances with partner organizations in developing countries in the South.[6] It has had considerable success in extending European gender equality norms to EU external behaviour and policy through the power of ideas, marshalling of information and innovative organizational strategies (Elgström 2000; Greenwood 2003). The Union's multilevel policy-making structure provides a flexible field of opportunities for gender and development advocates and other TANs to exert normative influence on the construction of EU interests and policies.

Advocacy networks play an important role in multilevel governance contexts such as the EU, where multiple boomerang effects – which Zippel (2004) coins the 'ping-pong effect' – influence policy change. The ping-pong effect is the product of interactions between gender and development advocates, EU Commission officials and member state policy-makers at several levels. In such a context, policy change is not only blocked and sought at the national level, but it is also sought at the European level as an end in itself and as a regional, superstate mechanism to further influence policy change and implementation nationally, regionally and internationally. The Commission actively supports and benefits from the specialized expertise of advocacy networks, in this case gender expertise, and builds alliances with relevant TANs to bolster its own political legitimacy with member states and European public opinion. Affiliating with a transnational network also affords advocates broader reach and a greater ability to influence EU policy.

Gender and development advocates form a community that is motivated by the core objective of achieving a gender-equal EU development policy. Six NGOs, as well as officials from institutional actors such as the EU, International Labour Organization (ILO) and UN, make up the gender and development TAN. Network Women in Development Europe (WIDE), APRODEV and Eurostep are European NGO networks for development aid that bring together national affiliate NGOs from several EU member states. CONCORD is a meta-level network of European networks. ActionAid and One World Action (OWA) are also development NGOs aimed at influencing EU policy. They are not membership organizations but have affiliates around the world. All these NGOs have made the promotion of gender equality a key objective and have one or more gender advocates on their staff. The gender advocates of these six organizations together form an informal 'gender and development circuit' in Brussels that has sought to promote the mainstreaming of gender concerns in EU external policies.

Like other NGO circuits, the gender and development TAN is a 'dense, highly interlocking network of individuals and overlapping organizations' (Greenwood 2003: 210). Advocates co-operate and network together in a voluntary and horizontal way by meeting once a month for an informal lunch in Brussels. This so-called 'gender lunch' is the perfect place for what Keck and Sikkink (1998) call the creation of 'common discourse': gender advocates exchange information on key gender and women's rights issues and create a common language in so doing. Each lunch has a main topic, which is elaborated on by one or more presentations and followed by discussion and informal networking. NGO gender advocates as well as institutional stakeholders (ILO, UN, EU officials), children's/youth organizations (e.g. Plan, Youth Forum) and health organizations (e.g. Stop Aids Alliance) participate and host the fora regularly.

Through co-operation and networking, the gender and development TAN creates transnational gender policy knowledge among activists, experts and policy-makers. Such knowledge is crucial not only in identifying the issue and putting it on the political agenda, but also in providing alternative framing discourses to challenge existing EU practice. TAN expertise is actively created, expanded and – most importantly – used for advocacy in bringing a gender perspective to EU development policy (Zippel 2004: 79). For example, in 2002, gender advocates from OWA and APRODEV published an influential briefing – 'Everywhere and Nowhere' – about EU gender mainstreaming efforts. The title captured the most problematic aspect of gender mainstreaming, thereby making it useful for advocacy. The idea that gender mainstreaming is supposed to be everywhere yet ends up being nowhere has become a standard expression for gender advocates. This example captures how TANs frame issues to attract the attention of target audiences, motivate collective action and affect policy change (Keck and Sikkink 1998).

Although information exchange is a crucial activity, the gender and development TAN ultimately seeks to influence outcomes and promote the implementation of gender equality objectives by pressuring target actors to adopt new policies and by monitoring compliance with existing policies. For example, the CONCORD

Gender and Development Task Force, comprising a representative group of gender advocates from the above-mentioned six NGOs, engages in the ongoing lobbying of EU institutions to ensure that gender equality objectives are mainstreamed in Union development policy. Organizing themselves into a strategic task force increases the bargaining power of gender advocates relative to EU institutions. Aware of this, at the beginning of 2007, the CONCORD Gender Task Force strengthened their co-operation and became the CONCORD Working Group with an increased membership from national platforms and networks. The Working Group engages in structured dialogue with EU institutions, including the Commission, the European Parliament, the EU Council and national governments. To illustrate the ping-pong effect of the gender and development TAN, we examine the CONCORD Gender and Development Task Force's lobbying efforts for amendments to the 2007 Commission Communication on gender and development.

Negotiating the Communication on gender in development co-operation

The first draft copy of the new 'Gender Communication' was available for civil society assessment in early 2006, followed by an official consultation in June 2006. During the consultation meeting, the CONCORD Working Group was able to give feedback to the gender specialists from DG Development. Several of the Task Force's comments were accepted and integrated into a new draft by Commission officials. However, by the end of 2006, the Gender Communication had disappeared off DG Development's agenda. EU Development Commissioner, Louis Michel, did not want a new explicit policy framework for promoting gender equality in development co-operation. However, at the insistence of the German Presidency (more specifically, its Development Ministers at the member state level), the Gender Communication was put back on DG Development's agenda in early January 2007. The new draft was revised and finalized with TAN input as it went through the institutional hierarchy once again.

By comparing the final version with the first draft for consultation, it is clear that the document had been strengthened considerably. Important gains by the CONCORD Working Group were references to trade liberalization, women's rights, access to resources and the equal opportunities domain, women's participation in peace operations and stronger references to the UN Security Council Resolution 1325 on women, security and peace building. Nonetheless, the Working Group did not succeed in getting a reference to policy coherence, i.e. coherence between the EU's trade and development policies and objectives and its commitments to promoting gender equality, into the final Communication.[7]

When the final version was released in March 2007, it was sent for comments to the EU Council and Parliament. The CONCORD Gender Working Group seized this opportunity for a ping-pong effect and sent a letter to the Council Development Co-operation Working Party (CODEV) with five general remarks: the need for deeper analysis and references to the growing feminization of poverty; the need to specify recourse for implementation; the need to strengthen the specific actions in the annex in the field of governance, employment and health; the need

for clear monitoring and follow-up at the EU and national levels; and the need for policy coherence. Success was achieved with the third point: strengthening actions in the area of health where the Task Force demanded the support of the EC and EU member states in promoting sexual and reproductive health and rights. The Council included a reference to the Maputo Protocol in the Council Conclusions. This Protocol covers a broad range of women's rights including strong commitments to sexual and reproductive rights. The inclusion of the Maputo Protocol in the Council Conclusions provoked a heated debate between Ireland, Malta and Poland, on the one hand, which are conservative in this respect and, on the other hand, member states that are socially liberal such as the Nordic states or the UK. The issue was resolved in favour of those member states that insisted on strong language recognizing sexual and reproductive rights.

Advocates of gender and development achieved further success in negotiating the Communication with the Council on the issue of policy coherence. The Council included in its conclusions the 'need to ensure that policy in other areas is coherent with the objectives of promoting gender equality and women's empowerment' (Council 2007: 3). The sentence could have been more forceful, but it signalled a victory for the CONCORD Working Group because they had succeeded in getting a reference to coherence in the Council Conclusions on the Communication. Such a reference serves as a precedent for advocates of gender and development to build on, as they seek a more thorough mainstreaming of gender equality goals into trade and competition policy as well as development policy.

Despite its achievement in getting a reference to policy coherence in the Communication, CONCORD was not successful in its attempts to genuinely strengthen the implementation and monitoring mechanisms in the Council Conclusions. The Council Conclusions only contain general remarks on monitoring and a reference to the Organization for Economic Co-operation and Development (OECD) gender policy marker for development aid,[8] which is not a strong monitoring tool. The Council welcomed the strengthening of monitoring and reporting at Commission level, but preferred to keep reporting and information exchange for member states at the same rather *ad hoc* level. The CONCORD Working Group met representatives from the European Parliament's Development Committee charged with drafting the Parliament's initiative report on the Communication. They exchanged views and shared with the Parliament's General Assembly CONCORD's perspective on the need to bolster the implementation and monitoring of the new Communication on gender and development.

This example of lobbying by CONCORD on the Commission Communication illustrates the multilevel nature of gender and development advocacy in the EU, and how advocates are able to intervene constructively in institutional processes, reshaping key policy directives. However, this success in shaping the adoption of new norms for gender equality in development policy does not imply that such norms have been consolidated. Rather, in operational terms, norm implementation and monitoring lags well behind the official policy commitments (Arts 2006; Lister 2006). Elgström (2000) observes that it is common that the articulation of formal norms does not necessarily result in their effective implementation.

The recent Communication negotiations reveal that EU advocates of gender and development have had to engage continuously in persuasive efforts just to keep gender on the development agenda. Yet, the existence of formal norms and commitments does create ‘a momentum of institutionalisation’ (Elgström 2000: 469). EU officials tend to follow ‘the logic of appropriateness’ and adhere at some level to official policy commitments, although bureaucratic apathy, lack of specialist gender expertise and more principled, norm resistance interact to impede the implementation of gender mainstreaming (Elgström 2000: 469). The next section explores in greater depth such institutional and political barriers to mainstreaming gender considerations in EU development policies and programmes. In a later section, suggestions are made as to how these barriers might be addressed and overcome by transnational gender and development advocacy networks.

‘Gendersclerosis’ in EU development policy

As argued above, the emergence of a strong gender discourse in EU policy documents has not gone hand in hand with strong norm implementation. European development co-operation risks ‘gendersclerosis’, as Lister (2006) puts it, or stagnation in promoting gender equality unless it addresses with stronger political will unequal, unintended and often negative gender impacts of EU development policy on women in developing countries. But the implementation of high-level political commitments on gender and development is threatened by a number of major geopolitical, institutional and financial challenges. This section provides an overview of the challenges that confront those gender advocates committed to achieving a more gender-equal European development policy.

Post-9/11 geopolitical environment

An overarching factor affecting the promotion of gender equality goals in all policies, and fuelling gendersclerosis, is the post-9/11 global geopolitical environment. Since 11 September 2001, the focus on security politics and UN reform has diminished the political urgency and space for promoting women’s rights and gender equality that existed in the 1990s (Sen 2005). In this global context, the political will and focus on supporting gender equality objectives has diminished as internal and external security initiatives command ultimate importance and override social development imperatives. European official development assistance (ODA) levels are in line with targeted goals, partly spurred on by the perceived need to address the ‘roots of terrorism’, but aid is often directed towards strategically important regions rather than the least developed countries (Orbie and Versluys 2008).

Gender mainstreaming has persisted in this context precisely because it appears to require no additional commitment of financial resources. Some feminist scholars have argued that mainstreaming has dissipated the international development expertise on women, diverted resources away from this specialist knowledge to producing bureaucratic tools such as checklists, action plans, scorecards,

implications and statements that can be used by anyone (Goetz and Sandler 2006). The strength of gender mainstreaming in extending a gender perspective across all international policy areas and jurisdictions is also precisely its weakness, as encapsulated in the gender and development TAN slogan, 'everywhere and nowhere', mentioned previously.

The changed security-focused geopolitical environment and its neglect of gender issues compared with the mid-late 1990s, despite initiatives such as UN Security Council Resolution 1325 on women, peace and security, makes it much harder for the EU to take on a stronger international role in promoting gender equality. Some Union observers in key development NGOs speak of a general 'gender fatigue' within European institutions.[9] This geopolitical trend might be expected to influence policy-making in DG RELEX[10] more than in DG Development. However, as the former has geographical responsibility for development policy in non-African, Caribbean and Pacific developing countries, the risk of global security issues creeping into EU development policies increases. Moreover, an indirect result of less global focus on development issues in the aftermath of 9/11 is that cross-cutting non-security issues are competing with each other for funding and political attention.[11]

Gender equality objectives have suffered from this overall trend as they have been lumped together with other, newer cross-cutting issues in EU development policy, such as children's rights, in a tick-box, checklist approach that does not allow for the analytical integration of these issues and win–win outcomes (see Chapter 13). The EU gender and development advocacy network is well aware of this risk of trading off gender equality for the environment or children's rights, for example, rather than analysing and developing policies that target their intersections. In 2007, European development organizations collaborated on how to counter a scenario in which cross-cutting issues start competing with each other for funds and political attention.

A shifting global aid agenda

As well as lobbying within an unfavourable geopolitical environment, gender advocates must work with challenging new global aid modalities in their efforts to keep gender on the EU international development agenda. International discussions on how to embed gender equality objectives within the reformed development aid structures are in progress. One of the main aims of the new aid architecture is to promote the ownership of policies by developing countries. In the EU, this is done mainly by shifting development aid from programme support to general or sectoral budget support. In other words, instead of targeted projects, development money is put into partner countries' overall budgets, whether or not certain sectors are accounted for. This approach fits well with the EU's gender mainstreaming prerogative, which similarly shifts the emphasis away from funding targeted positive action programmes for women to addressing gender equality issues as a routine part of all budgetary aid provisions.

However, there are concerns that, within this new aid architecture, gender equality could easily be sidelined. Budget support reduces EU donor influence

and clarity on how receiving countries allocate their resources. Because it is considered a mainstreamed, cross-cutting issue, gender equality is expected to be addressed in all general or sector budget support. Substantial resources are no longer designated for women or gender equality goals. But if women's voices in public decision-making remain muted, as they often do in developing countries, especially in sectors that are seen as male such as transport or macro-economic support, who will ensure that the development budget is sensitive rather than indifferent to gender issues (OECD DAC 2002)? The philosophy of country ownership is hard to reconcile with encouraging partner countries to implement a gender-sensitive policy. It implies that there must always be a demand for gender equality from the government of the developing country. Yet, in most cases, a civil society attentive to women's rights does not exist, and the women's organizations that do exist are either under-resourced and understaffed or focused on project implementation rather than policy advocacy.

The situation concerning the structure of aid is troubling because, if aid budgets do not include a gender perspective, then women are unlikely to benefit equally from expanded development assistance, and gender inequality will deepen both in developing countries and globally. Until now, gender equality has not fared well in the global aid effectiveness agenda. Evaluations of poverty reduction strategies and of sector-wide approaches to development assistance suggest that, with some notable exceptions, they have largely been gender blind (OECD DAC 2006; UNIFEM and European Commission 2006; Holvoet 2007).[12]

Transnational gender and development advocacy networks have a crucial role to play in making the new aid policies work for gender equality. At the local level, they can work together with civil societies to catalyse their support for gender equality and help them to lobby their national governments for more gender-aware policies. Further, at the level of development agencies and programming, they can push for national gender policies to influence the distribution and management of this aid (see also Chapter 10).

Financing for gender equality

Over time, the shrinking of EU funding for external gender mainstreaming initiatives is another factor suggesting gendersclerosis. The main identifiable and immediately measurable financial resource is the small thematic budget line for promoting gender equality in development co-operation, also known as the Gender Budget Line (GBL). The 1998 Regulation[13] provided its first legal basis and specified how the budget could be used to support gender mainstreaming in development co-operation, although the GBL had existed prior to 1998. The available budget (the so-called 'committed credits') and the actual commitments and disbursements in the years 1998–2006 are presented in Table 11.1.[14]

Prior to 1998, 5 million euros was made available annually (European Commission 2003a) but, since then, as Table 11.1 shows, the GBL and payments have greatly diminished, recovering only slightly between 2003 and 2006. Thus, the period immediately after the Beijing Conference was financially the most fruitful

for gender equality in EU development policies. The financial pattern confirms the perception of activists and academics about a period of stagnation in promoting gender equality (Sen 2005; Lister 2006; Bakker 2007).

Of further note is the difference between the annual budget, the amount committed to specific projects and contracts and the amount actually spent. Although the 1998 Regulation promised 25 million euros for the period 1999 to 2003 (i.e. five million euros annually), substantially less was actually committed. In programming, if not in policy, the budget was drastically reduced. Indeed, the 2003 EU Thematic Evaluation (European Commission 2003a) observed that the available financial resources were not being used fully to promote gender equality. Several factors had limited the use of resources for carrying out gender equality projects, including the extensive policy requirements for the GBL compared with other budget lines and insufficient infrastructure resources and staff capacity to disburse the limited credits for positive actions targeted at women in developing countries (European Commission 2003b: 49).[15]

The financial outlook for gender equality in development co-operation appears to be more supportive for the 2007–13 period. The EU budget for external relations has been overhauled with the number of budget lines and individual regulations being trimmed down. The GBL has been replaced by a major chapter in *Investing in People*, which integrates all human and social development issues – culture, employment and social cohesion, children and youth, skills and knowledge, health and gender equality – in a single document.[16] Crucially, the total amount dedicated to women-specific projects and gender equality has been significantly increased, if we compare the previous GBL 1995–2006 with the new gender chapter in *Investing in People* 2007–13. Whereas under the GBL 1995–2006, amounts between two and five million euros (see Table 11.1) were made available for women-specific projects, under *Investing in People*, a sum of 57 million euros has been made available for gender equality for the period 2007–13. This is 8.14 million euros annually, representing for most years more than double the amount previously committed for projects for promoting women's empowerment.[17]

This renewed financial commitment to addressing gender inequalities in developing countries addresses some of the fears of gender advocates that the 'simplification' of budgeting would result in a drastic decrease in the allocation for gender-specific projects. However, while the overall sum of development assistance for gender equality is greater, the global distribution of the money privileges EU interests over any principled normative commitment to development and the

Table 11.1 Gender budget line allocations and commitments 1998–2006 (in million euros)

	1998	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*	*2005*	*2006*
Budget available	5	3.3	1.4	2	2	2.5	2.9	2.8	2.8
Commitments	n.k.	3	1.4	1.7	2	2.5	2.9	2.8	2.8
Payments	3.2	1.2	1.7	1.9	0.9	2.3	1.3	1.6	2

n.k., not known.
Source: European Commission (2003a) and email exchange with AIDCO Unit F4 (May 2007).

needs of developing countries. Thus, 32 million euros will go to the designated European Neighbourhood countries (56 per cent or 4.57 million euros annually), while 25 million euros has been committed for the rest of the world (44 per cent or 3.57 million euros annually) including the African, Caribbean and Pacific countries which are among the poorest.[18] Nonetheless, the boost in EU financing for gender in development is a very favourable environment for those transnational advocates seeking to advance global gender equality, mitigating the gendersclerosis that may have been produced by the more discouraging global geopolitical and aid environment.

Gender knowledge base

One of the key institutional challenges confronting advocates and contributing to gendersclerosis in EU development policies is the lack of gender and development expertise in the Commission's external policy agencies, the RELEX 'family'. DG DEV, RELEX and AIDCO all have a designated person responsible for gender mainstreaming, but DG ECHO (Humanitarian Aid), ELARGE (Enlargement) and TRADE do not. However, even in the Directorates General that do have a gender mainstreaming focal point, this is not a full-time function as the administrator is also responsible for other 'soft' issues. For example, particularly illuminating is the line up of gender, culture and sports responsibilities for the designated official in DG DEV. The incoherence of these responsibilities casts serious doubts over the Development Commissioner's commitment to the promotion of gender equality.

An institutional unit or body of gender experts does not exist in DG RELEX. In the past, the ILO International Training Centre collaborated closely with the Commission's external relations services by offering gender training and technical assistance as the 'EC Gender Help Desk' within the framework of the project 'Methodological Support (Manual) and Training on Gender Mainstreaming' (2004–6). Currently, there is no such help desk to support the RELEX family and thus compensate for the lack of in-house gender expertise. Since April 2007, the Gender Help Desk's mandate has been scaled down to support EC delegations in twelve partner countries only.[19]

A tendering procedure has been launched by AIDCO to contract a pool of gender experts to support the Commission headquarters as well as all EU delegations in partner developing countries. This gender expert pool was expected to be operational from January 2008 and could possibly function as a link between internal capacity building and external development programme activities. But a temporary contract with outside consultants is not a sustainable mechanism for mainstreaming gender at every level and across all EU policies and operations externally. The Union has interpreted gender mainstreaming as not requiring specialist knowledge but rather as a methodology for policy-making which, beyond its initial institutionalization, can be implemented routinely by any and every official (see Stratigaki 2005). Such an approach greatly underestimates the expertise required to develop and implement gender-sensitive methodologies to

development policy and planning. On-line delivery of basic gender training for line staff alone is likely to be insufficient to empower them to be able to access and apply gender expertise in their work, and the Commission has not conducted an evaluation of this training that would suggest otherwise.

One new EU initiative, the AIDCO Network for EC Gender Focal Persons, does have the potential to build the expertise needed to devise and implement gender-equal development policies and programmes and reverse the trend towards gendersclerosis. The network was re-established in 2007 with 66 per cent of EC delegations in partner countries nominating a gender focal person (GFP).[20] In November 2007, a workshop for GFPs was held in Brussels with the aim of updating them on the latest developments in gender equality in development policy at the Commission level, and formulating a work plan for the network. The meeting provided a learning opportunity for sharing experience and information on how best to promote gender equality in development contexts. Looking to the future, the network may be able to overcome some of the problems in sustaining gender mainstreaming, particularly in dispersed and localized development contexts with different and often temporary dynamics. However, designated GFPs cannot be solely responsible for mainstreaming gender in EU development policy, and the job of mainstreaming is not done merely by appointing a GFP. What is needed is leadership from the top down, internal structures and mechanisms to support gender mainstreaming and the GFP network.

Gender-balanced representation

A major factor suggesting gendersclerosis in EU development co-operation is the lack of a high-level gender champion. The disinterest shown by Commissioner Michel in 2006 in having an explicit policy document on gender and development co-operation illustrates this lack of leadership. As previously discussed, it was only the German Presidency that saved the EU's commitment to the international promotion of gender equality, with the adoption of a new Communication in 2007.

The responsibility for mainstreaming gender in EU development co-operation ultimately rests with senior management, and the extent to which such management is gender balanced is integral to the gender mainstreaming policy strategy.[21] Beveridge and Nott (2002) argue that gender mainstreaming can only be transformative if it enhances the participation and inclusion of women in decision-making. Similarly, we contend here that a major institutional factor affecting gendersclerosis in EU development policy is the Commission's own leadership by example on gender equality.

Gender balance in decision-making is one of the EU's guiding policy commitments and is stressed in the 2007 Communication and prior Regulations on gender and development co-operation. Yet gender imbalance in senior policy-making positions reigns in EU institutions, especially in those institutions focusing on external rather than internal policies (i.e. the RELEX family: Development, External Relations, Enlargement, EuropeAid, Humanitarian Aid), as revealed in the statistical evidence gathered. Within the DG RELEX family, men dominate

top-level management and policy-making while women are seriously under-represented. As Table 11.2 shows, in the DG RELEX family, on average 92.7 per cent of top-level managers are men with just 7.3 per cent of these positions held by women. In raw numbers, this means there are five female senior managers to every sixty-three male senior managers. This glaring gender imbalance in external policy-making is remarkable as gender equality is considered to be a high priority in all EC policies.

If we compare the external European Commission DGs with the internal European Commission DGs, we see another glaring imbalance (see Table 11.3): 18.66 per cent of senior management are women in the internal DGs compared with 7.3 per cent in the external DGs. It appears, therefore, that women are much more present in decision-making positions in internal EU policy areas than in external policy areas, and that DG Trade, Development and Enlargement are at the extremes of that gender imbalance.

Of course, the mere presence of women in high-level policy-making positions will not by itself lead to gender-specific concerns being addressed in EU policies. Yet the political will to address gender imbalance within the external DGs does give an indication of the motivation for mainstreaming gender in the EU's external policies. Central to the EU's identity in the world is its normative power, i.e. its ability to shape conceptions of 'normal' in global politics (Manners 2002). This is done largely by serving as a virtuous example for the rest of the world of how mutually beneficial international relations can be conducted. If the EU has difficulties in implementing gender balance internally, then the global diffusion of its gender equality norms will be hampered and its legitimacy as a normative power may come into question.

Table 11.2 Gender balance in policy-making – senior positions in the RELEX family

DG EXTERNAL	*F*	*M*	*F+M*	*% F*
AIDCO	1	7	8	12.50%
DEV	0	6	6	0.00%
ECHO	0	2	2	0.00%
ELARG	0	5	5	0.00%
RELEX	1	14	15	6.70%
SEU[24]	1	19	20	5.00%
TRADE	2	10	12	16.70%
TOTAL	5	63	68	7.35%

F, female; M, male.
Source: Kallas 2007.

Table 11.3 Senior management gender balance – external and internal DGs

	F	*M*	*F+M*	*% F*
DG Internal	50	218	268	18.66%
DG External	5	63	68	7.35%

F, female; M, male.
Source: Kallas 2007.

Advancing a gender perspective on EU development co-operation

Global politics has changed the terrain of EU development policy-making, and affected the progress of gender mainstreaming in particular. The post-9/11 geopolitical environment that prioritizes security over development (or the 'securitization of development') and the shift in aid modalities towards country ownership have made the integration of gender equality less important and more readily available, depending on the political will of individual leaders and countries. In addition, institutional factors at the EU level have also contributed to the perception of gendersclerosis in Union development policy, for instance the lack of EU institutional leadership for gender mainstreaming, as revealed by the limited Commission in-house gender expertise and the gender imbalance among senior management within the DG RELEX family. Clearly, there is a significant gap between the official rhetoric and the practice of EU gender mainstreaming in development co-operation. The last section of this chapter considers how gender and development TANs can lessen the effects of gendersclerosis as they seek to advance a gender equity perspective in EU development co-operation.

The general trend towards giving southern developing country partners greater control over development assistance requires European NGOs to develop much closer co-operation with southern partners in order to influence the development agenda (see generally Chapter 12 in relation to southern NGOs' involvement in EU development lobbying). Strengthening and institutionalizing its partnerships with southern gender equality advocates and NGOs would make the gender and development advocacy network more transnational and therefore more effective in promoting the implementation of gender norms. To be relevant to the people being represented in the south, and to be credible within the EU, contacts and networks with southern partners are indispensable. Similarly, organizations in the south get more attention from their government if they are backed by NGOs in the north. European gender advocates could increase their influence by providing expertise to southern women's rights NGOs and helping them to access both EU funding and consultancies. Lobby actions for gender-equal development policies in Europe are strengthened by backing from civil society stakeholders in recipient countries, especially by those who are most affected by the policies. For example, the successful advocacy campaign against the import into the EU of frozen chicken parts was led by an African organization, but also involved close north–south co-operation. APRODEV actively supported its partner organization in lobbying the EU and worked on the gender dimension of the case.[22]

Most of the six NGOs in the European gender and development advocacy network currently have partnerships in the south on either a permanent or an *ad hoc* basis.[23] For example, within APRODEV, there is a regional gender training network in which southern women are training European women and challenging them in their development practices. Another good example of European–developing country collaboration is a Eurostep-sponsored southern civil society study, which assessed southern partners' participation in the drafting of EU Country Support

Programmes. The *ad hoc* collaboration with southern partners working on gender equality needs to be more formally institutionalized in order to increase TAN influence on development policy and programming.

With the assistance of the European gender and development advocacy network, for instance, gender networks focusing on policy advocacy as well as development implementation can be built up in every developing partner country. Southern and European gender networks can combine and increase their resources to monitor the development process across the EU and in developing country institutions. In this way, an active TAN can function as a government and development watchdog. This role is increasingly important now that the EU is implementing the use of sectoral budget support in development aid to partner countries. Likewise, this co-operation with southern partners is indispensable from a gender perspective that seeks to empower women and give them genuine ownership of development.

As well as building their transnational alliances with southern partners, gender and development advocates need to lobby for persons committed to gender equality to lead the major European external policy-making institutions, especially the Commissioners, the EU President and chairpersons of key committees. The influence of the CONCORD Working Group on the final 2007 Communication on gender, via the German Presidency but not the indifferent Development Commissioner, demonstrates the importance of leadership for gender equality. High-level gender champions in the EU context may be able to overcome a global geopolitical environment that tends to marginalize any attention to gender issues. Policies can be blocked even when they are already in the pipeline. But by building alliances with officials inside European institutions, the gender and development TAN can keep the pressure on these institutions to ensure the ongoing implementation of gender mainstreaming.

As well as lobbying for gender champions, the gender and development TAN could set up advocacy campaigns to create a strong gender structure within the Commission hierarchy. A DG RELEX gender task force at Director level – comparable to the CONCORD advocacy network structure – would mean a leap forward in terms of the visibility and coherence of external gender policies. Such an initiative would foster gender mainstreaming by making RELEX Directors responsible for it centrally. In addition, those Directors who are already sensitive to gender mainstreaming would be empowered in the broader EU external policy-making realm.

Gender advocates could also lobby for obligatory gender training for higher management posts as another means of strengthening gender awareness within the Commission's institutional hierarchy. Awareness and responsibility for gender mainstreaming among Commission staff would increase if gender training was mandatory for civil servants who want to become Directors. This idea could be extended to all cross-cutting issues (environment, children's rights, human rights, etc.). As all these topics should be mainstreamed through all EC policies, mandatory training on cross-cutting issues before being promoted to higher management functions would seem a straightforward requirement. Development TANs could join forces in an advocacy alliance campaigning for a module of courses. Moreover, campaigning

together would tackle the rising risk of competition between cross-cutting issues. It would provide an opportunity to show how gender intersects with other issues and to showcase how gender analysis provides a methodological alternative to traditional policy analysis by disaggregating populations and integrating a range of issues from the bottom up. As well as lobbying for the implementation of norms, campaigning for increased gender responsibility and awareness at high management level has the potential to advance gender in development and narrow the gap between official commitments and operational practice.

Conclusions

The EU has made impressive political commitments to gender equality in development policy and has created a strong policy framework over more than a decade. A European gender and development advocacy network comprising individual advocates, NGOs, EU officials and grassroots movements has played an important role in this norm-creating process. However, political commitments have not always translated into consistent and comprehensive implementation. This implementation gap results in part from the difficulty and complexity of mainstreaming gender in development policy and developing country operations. However, policy complexity is not a sufficient explanation for poor implementation.

Weak institutional leadership and political will has led to inadequate and diminishing human and financial resources for mainstreaming gender in all aspects of development co-operation. A comparison with the Commission's external policy DGs suggests an institutional norm that includes gender issues in development aid and international co-operation but excludes them from trade and security relationships with the same developing countries. Gender equality has been framed primarily as an economic issue for developing countries. As such, gender equality has typically been construed as a means to the other ends – for example, where gender equity in education is seen to greatly increase women's employment and community incomes with flow-on effects for developing countries' economic and trade capacities. Moreover, as development policy has increasingly become tethered to trade and security policy in the post-9/11 context, the social and political dimensions of gender equality as a fundamental human right and human development goal have lost their previous normative resonance in the EU.

In many respects, the gender and development TAN has been very successful in mainstreaming a gender perspective in EU development policy. Collective organizing through the gender lunch and CONCORD Working Group has facilitated gender and development advocacy, monitoring and lobby efforts at the European level. Participating in the TAN enhances the visibility of the gender advocates as well as that of the gender and development issues across the EU. TAN interventions have been proactive, institutionally balanced and have resulted in changed policy, as demonstrated by the 2007 Communication on gender.

The existence of a strong European and international policy framework for the promotion of gender equality in development policies provides a favourable opportunity for gender advocacy. However, as formal norms do not necessarily result in

actual implementation, gender advocates must continually engage in persuasive efforts and negotiations with institutional partners to keep gender on the international development agenda. To achieve their vision of gender-equal development on the ground, advocates should work to maximize and leverage the ping-pong effect of their transnational network. At the European level, they need to lobby for a stronger gender structure within the EU Commission hierarchy – in Brussels as well as in the EC delegations – to increase gender responsibility and awareness among senior management. At the developing country level, they need to enlarge and deepen their transnational network by formalizing and intensifying their collaborations with those southern partner NGOs working for gender equality.

Notes

1 See Article 1a and Article 2 of the Lisbon Reform Treaty (Article 2).
2 Official EU policy emphasized that gender mainstreaming does not displace prior policy initiatives, such as equal opportunities and positive action measures for women, but analysts who have looked closely at the political dynamics of gender mainstreaming have argued that it has been used strategically by certain actors to reduce separate projects and budget lines for women (see Stratigaki 2005).
3 These policy commitments towards integrating gender in development policy include: the 1998 (binding) Regulation on Integrating Gender Issues in Development Co-operation; the Council and Commission Declaration on the European Community's Development Policy of 2000; the 2001 Programme of Action for the Mainstreaming of Gender Equality in EC development co-operation that discusses gender as a cross-cutting issue together with human rights and the environment; and the updated 2004 Regulation which acknowledges that gender mainstreaming needs to be complemented by 'specific measures to support the empowerment of women through their economic and social roles' (European Commission 2003b).
4 It must be noted that good practices are available for bringing gender equality into EU development policies. A best practice of institutional capacity-building can be found in Guatemala. In 2001, the EC delegation set up a multidisciplinary network of gender specialists from delegations, government and civil society to improve the gender equality aspects of EC co-operation. The network has facilitated the identification and utilization of gender specialist competence where required in EC mainstream support to Guatemala. Today, the network has developed into an alliance between the same partners, although ownership has shifted to the government's Women's Presidential Secretariat (EuropeAid 2004).
5 For Zippel (2004), the inclusion of insiders and outsiders in the network is a distinctive feature of a TAN. She argues that the link that is created between institutional and non-institutional actors differentiates a TAN from a social movement.
6 As well as in the new gender Communication, several European or other international policy documents place more emphasis on 'southernization' of development aid. For those European NGOs advocating gender equality, this implies that having contacts and networking in the south is becoming more important. Some academics have argued that European NGOs have responded to this southern reorientation of EU development policy with 'frustration … and resistance, because of the limited roles they are asked to play' (Carbone 2006). This observation is probably untrue for the gender and development TAN.
7 The 2005 Commission Communication on policy coherence for development explicitly states that non-aid policies (trade, environment, agriculture, fisheries, food safety, transport and energy, and EU migration) 'should respect development policy' and

'should have a proper gender equality perspective, to avoid them losing half of their potential impact'. Therefore, it is surprising that the Commission did not want to include a reference to policy coherence in the Communication on gender equality and women empowerment in development co-operation.

8 The OECD Development Co-operation Directorate Gender Equality Marker is an instrument that measures gender mainstreaming. Donors are required to mark each development aid activity, regardless of its sector, to indicate whether gender equality is seen as a principal objective, a significant objective or not as an objective of the project. The problematic aspect of the marker is its orientation towards the programming of development assistance, and not towards the actual implementation. This reflects the 'tick the box' syndrome, where gender is merely a box that has to be ticked by the project manager on a programming sheet.

9 Interview with Karen Ulmer, APRODEV, 11 January 2007, Brussels.

10 DG RELEX is the European Commission's Directorate General for External Relations.

11 Participation observation at NGO strategy meeting on 'Where is the money for human and social development in current EC programming?', organized by EEPA and Eurostep, 24 January 2007, Brussels.

12 The most common problem is that, if gender is addressed, it is only found in the diagnosis of the policy problem but not translated into priority actions with matching budgets and indicators to monitor these actions. For example, the country strategy paper (CSP) for Argentina states that 'cross-cutting priorities, such as gender equality…will be integrated, whenever possible and appropriate'. The CSP uses data on women's salaries and female heads of households to illustrate that 'gender inequalities remain considerable'. The problem is that, in the large majority of cases, this observation remains the end point.

13 Council Regulation 2836/98 of 22 December 1998, OJ L 354.

14 Table 11.1 is the extended version of gender budget line allocations and commitments 1998–2002; Table 11.2, Thematic evaluation of the integration of gender in EC development co-operation with third countries (European Commission 2003a). Added information for 2003–6 is provided by AIDCO G8.

15 In addition, the selection system and the criteria for funding are often too strict, excluding smaller partner NGOs. For example, many smaller southern NGOs are eliminated in the first selection round for funding, without even considering their proposals, because of insufficient money in their own bank accounts. It is obvious that such an approach is hampering ownership and the strengthening of civil society. Within DG Development, voices are being raised to change the criteria in order to allow smaller NGOs in the south to obtain EC funding. Interview, Tamas Varnai, DG Development, 4 July 2007, Brussels.

16 It is important to note that 'Investing in people' is also a Commission Communication – see above about weaker legal status and reduced European Parliament (EP) scrutiny.

17 Interview, Tamas Varnai, DG Development, 4 July 2007, Brussels.

18 Interview, Tamas Varnai, DG Development, 4 July 2007, Brussels.

19 In September 2007, the European Commission, the United Nations Development Fund for Women (UNIFEM) and the International Training Centre of the International Labour Organization (ITC-ILO) launched the EC/UN Partnership on Gender Equality for Development and Peace. UNIFEM and ITC-ILO will work closely with EC delegations in twelve developing countries to identify practical approaches to furthering gender equality through new aid modalities. These twelve cases could perhaps serve as 'best practices' for achieving gender equality and women's empowerment through national development strategies, poverty reduction strategies, sector-wide approaches and general budget support.

20 The role of GFP is not included in the job description of persons taking on the role, which means they cannot officially dedicate a certain percentage of their working time to the issue and there is no official recognition of their achievements.

21 From the outset, the representation and presence of women were considered integral to the gender mainstreaming strategy. For example, the requirement that gender equality goals be mainstreamed in the EU Structural Funds provided incentives for Union policy agencies to implement mainstreaming by, among other things, ensuring balanced representation of women and men in EU-funded projects.
22 Interview, Karen Ulmer, APRODEV, 11 January 2007, Brussels; e-mail exchange with Louise Hilditch, ActionAid, 26 July 2007; e-mail exchange with Nerea Craviotto, WIDE, 1 August 2007; interview, Nathalie Ewing, CONCORD, 5 October 2007; interview, Lisa Crisostomo, Eurostep, 10 October 2007.
23 Towards the end of formal partnerships, the members of CONCORD have agreed to have a common strategy regarding relations with the south, and a new structure is currently being discussed. Interview, Nathalie Ewing, CONCORD, 5 October 2007.
24 The DG for Personnel and Administration differentiates between RELEX (headquarters) and SEU (staff in delegations).

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12 Civil society and EU development policies in Africa and Latin America

An Huybrechts and Rafael Peels

The importance of social development in the south, and the key role of civil society involvement in achieving this, was clearly recognized in the report of the World Commission on the Social Dimension of Globalization (WCSDG) (see also Chapter 1). The report pointed out that the positive benefits of globalization remain unevenly distributed. It stressed the need for the international community to harness globalization to serve social as well as economic goals in order to secure more equitable social development for all (WCSDG 2004). In its reaction to the WCSDG report, the European Union (EU) recognizes the importance of strengthening the social dimension of globalization. Accordingly, with regard to EU external policies, the WCSDG report is particularly relevant. The European Commission states:

> The European Community's relations with third countries encompass a large number of issues addressed by the report of the WCSDG, in particular good governance, the rule of law, human rights and democratisation, as well as the social development as the necessary corollary of economic development to ensure sustainable progress.
>
> European Commission (2004: 10)

This chapter will look more closely at the social dimension of the EU's external relations with developing countries. Special attention will be given to the Union's involvement of civil society to promote this social dimension. Since the second half of the 1990s, the EU has paid increasing attention to the involvement of civil society in its external relations with developing countries. In addition, the WCSDG acknowledges civil and social dialogue as an important element in strengthening the social dimension of globalization.

Two issues will be analysed based on two case studies, each of which focuses on a particular region, i.e. Africa and Latin America. First, the coherence between the EU's internal and external (development) policies will be examined regarding its commitment to civil society participation as a means of strengthening the social dimension of Union policies. Second, the consistency of this engagement towards social dimension, and civil society organization (CSO) participation in particular, will be monitored throughout the different external policy areas, i.e. development, trade and social/political issues.

In order to analyse these two issues, in-depth research is needed into the EU's engagement towards CSO participation. The following section will put the social dimension and civil and social dialogue, as it is described in the WCSDG report, within the broader evolution of the EU's social agenda and civil society involvement in its external relations with developing countries. In the second and third sections, the outcomes of this theoretical analysis will be tested in practice, based on the two case studies from Africa and Latin America. Special attention will be given to the quality of participation with, on the one hand, identification of three dimensions to define quality participation and, on the other hand, an in-depth analysis of how the different actors involved (i.e. government, CSOs, EU) can play a role in fostering quality CSO participation. In the fourth and final section, the case study findings will be used to finalize an analysis of the two key issues central to this paper, i.e. EU policy coherence and consistency.

Social dimension and civil society involvement in EU development policies

The social dimension

The social dimension is not a new phenomenon in Europe's external policies towards developing countries. These policies have always closely combined the three pillars of political/social issues, trade and development (Bossuyt 2006), although the importance given to each of the three dimensions has varied over time.

Before the 1990s, Europe's policies towards developing countries tended to reflect old ties with ex-colonies, in the case of the Lomé framework for the ACP countries (Africa, the Caribbean and the Pacific), or were *ad hoc*, fragmented and limited in scope, as was the case for relations with the Indian subcontinent, Asia and Latin America (Holland 2002: 2). There was a strong focus on the trade and development pillar, whereas political or social requirements were of minor significance. By the mid-1990s, new interests and beliefs brought the EU's external policies towards developing countries under scrutiny. Politically, the end of the Cold War not only diminished the need for strategic alliances, but also created new opportunities for potential partnerships, i.e. with the eastern and central European countries. Hence, social and political issues, such as 'good governance' with respect for 'human rights', 'democratic principles' and the 'rule of law', became much easier to demand. Economically, preferential trade had not brought the growth and reduction in poverty hoped for, and was replaced with a trade regime of reciprocal rules in order to become World Trade Organization (WTO) compatible. As regards development co-operation, the world faced a general aid fatigue due to a lack of results and too much inefficiency, bureaucracy and misuse of aid sources. A new focus was placed on greater aid effectiveness through the inclusion of performance indicators (ECDPM 2002).

This shift in the mid-1990s showed the EU's increasing commitment to the social and political dimension of its external relations towards developing countries (ACP,

Asia and Latin America). Formally, the EU argued that the stronger political and social agenda was necessary because of the Treaty obligations agreed in Maastricht (Holland 2002: 2). The explicit reference in Article 170 to 'sustainable economic and social development' with a clear focus on poverty reduction was the first formal indication of a shift in the EU's future external relations with developing countries, giving increasing importance to the social and political pillar. This provision reflected a more general rise of the social and political dimension to a higher global development level at the start of the new millennium. The Millennium Development Goals (MDGs), introduced at the UN Summit in 2000, and the Poverty Reduction Strategy Papers (PRSPs), initiated by the Bretton Woods Institutions in 1999, set the tone for greater attention to social issues and poverty reduction.

The levelling of the playing field among the three pillars in the EU's external policies towards developing countries by greater attention to social and political issues was further strengthened by an explicit commitment in the EU Consensus on Development (EU 2006) for more consistency among policy domains by various EU institutions and member states. The demand originated from two key meetings, i.e. the Monterrey Consensus on Financing for Development (2002) for more and better aid and the Paris Declaration on Aid Effectiveness (2005) with a focus on harmonization and alignment of donor actions in development (EU 2006). The commitment was formulated in a Policy Coherence for Development (PCD) statement on how non-aid policies could assist developing countries in achieving the MDGs. The Commission Communication identified eleven different policy areas where the challenge of enhancing the consistency with development policy objectives was considered particularly relevant as regards helping developing countries to achieve the MDGs. One of these policy areas is 'the social dimension of globalization, employment and decent work', set out by the WCSDG report discussed above. Another area is trade (see Chapter 9), where the EU is strongly committed to ensuring a development-friendly and sustainable outcome of the Doha Development Agenda, to continuing the negotiations of the EU–ACP Economic Partnership Agreements (EPAs) and improving its Generalized System of Preferences (GSP) (European Commission 2004; European Council 2006).

The various documents and references above show that, in theory at least, the EU has increased its commitment to the social dimension and that, in terms of both EU internal and external policy coherence and consistency among different policy areas, important policy papers have been drafted in recent years.

Civil society involvement

One way of promoting increased EU commitment to the social dimension in Union policies is by facilitating CSO involvement. Since the second half of the 1990s, the EU has paid increasing attention to the involvement of civil society in its external relations with developing countries. Improving governance being a major objective, the need for civil society participation is expressed in various EU policy documents (European Commission 2001, 2004, 2007b; EU 2006). Civil society is expected to contribute to the democratic process by influencing and

controlling policy-making, by enhancing the transparency and accountability of governments and by fostering public goods, such as human rights, social equality and political freedom (see Chapter 11 for a discussion of the involvement of European civil society in development policy).

Theoretically, the roots of civil society involvement lie in the debate on the concepts of participatory democracy versus representative democracy. Whereas the latter places parliament and government as representative governing institutions legitimized by elections at the centre of policy-making, the former refers to a democratic model based on the direct involvement of citizens and their organizations (the so-called civil society organizations or CSOs), which pass on their views and act on their behalf when deliberating on policy decisions (Fuchs 2007). The European Commission (2002) states that the decision-making process in the EU is primarily legitimized by elected representatives of the European people, i.e. the representative model of democracy. Nevertheless, civil society involvement and participatory democratic practices are recognized as complementary but vital elements of EU policy-making.

Apart from the participatory democratic principles as the EU's main rationale for strengthening civil society involvement in EU policy-making, three other reasons could be mentioned: first, to allow specific groups of citizens to represent their views to the European institutions (for instance, to provide a voice to ethnic minorities or people with disabilities who tend to be heard less through other channels); second, to contribute to policy-making because of CSO's expertise on particular issues; and third, to contribute to project management, monitoring or evaluation (European Commission 2000). When referring in particular to the involvement of civil society in the EU's external relations, three more elements can be added: first, to better assess the global impact of Union policy-making (European Commission 2004); second, to strengthen the democratic process in developing countries (European Commission 2000); and third, to partly bypass undemocratic governments in EU external policies.

When it comes to identifying the actors in this civil society involvement, no clear-cut answers can be found. Although the concept of civil society is discussed extensively in academic and policy literature, there is no commonly accepted, let alone legal, definition of civil society. It is a complex and elusive concept. The broad interpretation of the concept becomes clear when considering the variety of terms used by the EU regarding civil society – for instance, CSOs, non-state actors (NSAs), stakeholders, non-governmental organizations (NGOs) and third-sector or interest-representing organizations. In an attempt to categorise this group under a common description, the Commission identifies CSOs as the principal structures of society outside of government and public administration. This means that business actors may also be included in the concept of civil society (European Commission 2002). In general, however, and also in this chapter, the concept of NSA is used to refer to all non-state actors, whereas civil society is understood as the non-profit part of this group (Lister and Carbone 2006).

The diversity among CSOs and the various interpretations of the concept, depending on the context, i.e. different countries and EU institutions in which

they operate, have resulted in a broad array of civil society participatory mechanisms (European Commission 2006a). These mechanisms range from informal initiatives (e.g. consultation via the internet, *ad hoc* meetings, civil society meetings organized in parallel with ministerial meetings between the EU and developing countries' governments, and the participation of civil society representatives in expert groups) to more formalized arrangements (e.g. regular meetings with CSOs and networks, tripartite dialogue with the social partners or participation in advisory committees as part of a formal consultation process) (European Commission 2000). Although these mechanisms can be used in all phases of the public policy process, i.e. from the development phase of the agreement through the implementation phase to its monitoring and evaluation, in this chapter, the analysis will be limited to the policy development phase of public policies.

The findings above illustrate the EU's increasing formal commitment to the social/political dimension of its external policies in recent years and, in particular, civil society involvement. The Union's unique position creates opportunities to promote civil society participation, and the tools to achieve this have been developed in various documents. Indeed, if and when this formal engagement is translated into practice, the circumstances surrounding this will be analysed below, using data from case studies on civil society involvement in EU policies towards Africa and Latin America.

EU relations with Africa

Institutional framework

The European Community has a long history of relations with Africa. Since the early 1970s, the EU has negotiated partnerships with ACP countries (i.e. sub-Saharan Africa, Caribbean, Pacific countries). In addition, the EU signed a Trade Development and Cooperation Agreement (TDCA) with South Africa, and manages its relations with North Africa through the Euro-Mediterranean partnership and the European Neighbourhood Policy (see Chapter 4 on the ENP).

These formal social/political, trade and development ties comprise huge transactions between the two regions. Europe and Africa are connected by strong trade links, making the EU the biggest export market for African products. In addition, aid flows to African countries are substantial. The Union (member states and EU institutions) is by far the biggest donor worldwide. In 2003, the EU's Official Development Assistance (ODA) accounted for 60 per cent of the total ODA going to Africa. In that same year, EU development aid to Africa totalled 15 billion euros, compared with 5 billion euros in 1985. In June 2005, the Union committed itself to increasing the ODA to 0.56 per cent of gross national income (GNI) by 2010 and 0.7 per cent by 2015. At least 50 per cent of the increased aid will be reserved for Africa (European Commission 2005).

The above figures illustrate a broader policy shift by the EU in recent years towards more aid (including aid for trade) for Africa. In addition, better aid has been a major issue in Union policy debates. Although the EU is the largest donor,

development aid is fragmentary and often not coherent with other Union policy domains. The European Consensus on Development tries to tackle these problems of harmonization among donor policies and the consistency of various policy domains. Its first application is the EU Strategy for Africa, adopted in 2005 and setting out a common European framework to attain the MDGs (EU 2006). Apart from this new strategy, ACP–EU relations have been managed for over twenty years through the ACP–EU Partnership Agreement, originally known as the Lomé Conventions, but, following reviews in 2000 and 2005, now referred to as the Cotonou Agreement. This offers a framework for trade negotiations on EPAs and has defined 'good governance' as a fundamental element of the agreement and 'respect for human rights', 'democratic principles' and the 'rule of law' as essential elements for co-operation (European Union 2005; see Chapter 9). In promoting this increased political and social engagement, the EU has opened up the ACP–EU Partnership Agreement to new actors: the NSAs.

The new role that NSAs has to play in ACP–EU negotiations is set out in the legal provisions of the Cotonou Agreement (2000, 2005). A strengthened political dialogue in accordance with Article 8 of the (revised) Cotonou Agreement is fostered by recognition in Article 2 of participation as a fundamental principle of the Partnership Agreement. Articles 4–7 stipulate in greater detail the provisions for each of the actors in the partnership. Article 4 foresees that, where appropriate, these NSAs shall be informed, consulted, involved in implementation and provided with resources and capacity-building support. Although ACP states remain the EU's privileged partners, the Cotonou Agreement gives NSAs legal grounding to make their voices heard. Moreover, a maximum of 15 per cent of the European Development Fund (EDF) to finance the Cotonou Agreement in each country could be reserved to finance capacity-building among NSAs, as regards their participation in the Agreement, although this is only possible if the respective government gives its consent.

Just how these new opportunities for a stronger political and social dimension in the Cotonou Agreement through NSA involvement are being put in practice will be analysed in the following section, principally based on a case study of Cotonou Agreement negotiations in Senegal, along with findings from Rwanda. Negotiations on the Cotonou Agreement take place at both national and regional level. Whereas negotiations on the provision of EC aid to ACP countries and on the essential and fundamental political and social elements of the Agreement are mainly held at national ACP country level, trade talks have taken place primarily at a regional level. As the case studies were conducted at the national level of Senegal and Rwanda policy-making, the trade discussions will not be part of our case study analysis.[1]

The ACP–EU Cotonou Agreement: discourse or reality?

As civil society involvement in the ACP–EU relations is relatively new, the actors involved are participating in a learning process that is both challenging and time consuming. Nevertheless, when assessing the extent to which local civil society

in Africa has actually been involved in public policy negotiations on developing the ACP–EU Partnership Agreement, very significant differences in outcomes can be observed. Whether or not the civil society participation being supported by the EU in its internal policies (see Chapter 11) can also work in its external relations depends on specific circumstances under which this civil society involvement occurs, and the way in which the EU is able to influence them.

Defining quality participation

Not only is the participation of CSOs important, but also the way in which they do this. The case study findings show that the quality of participation is often very problematic. Three dimensions have been identified as defining quality participation.

Institutionalizing participation

In order to enable quality participation, initially it is important that the participating NSAs meet each other on a regular (not *ad hoc*) basis and in an institutionalized setting. Apart from the fact that NSAs are not supposed to be involved in the selection of the priority areas, which remains the exclusive prerogative of the official parties, i.e. the EU and the ACP states, getting involved in the different stages of the Cotonou Agreement process is not the main challenge. NSAs are allowed to participate on a regular basis, and are already making contributions to the elaboration phase of the Country Strategy Paper (CSP) and the National Indicative Programme (NIP) in Senegal. This is important because participation in public policy-making on a national level provides an opportunity to move beyond the sector negotiations with line ministries and get a broader picture at a higher policy level. Further, they are invited to identify and develop projects for implementing the NIP and may also participate in their implementation, monitoring and evaluation. Moreover, a platform for NSAs ensures that participation takes place in an institutionalized manner. Hence, in Senegal, civil society involvement is relatively institutionalized. However, the question is whether or not this is also reflected in the level of intensity and the areas of participation.

Level of intensity of participation

NSAs can participate in public policy-making at different levels of intensity. In both Rwanda and Senegal, they were invited to meetings where the Cotonou Agreement was presented. In both cases, there was information sharing, i.e. one-way information flows (Brinkerhoff and Goldsmith 2003), although apparently this was less well executed in Rwanda than in Senegal. In particular, the fact that NSAs were invited to meetings too late, and only received the documents on which they were supposed to comment on the same day as the meeting, did not allow for true consultation, i.e. two-way information flows and exchange of views. In Senegal, NSAs felt that they really had been consulted, although it is too

early to judge the extent to which their concerns were actually taken into account. Shared decision-making at participation level is not possible as the Cotonou Agreement states that the principal actors, i.e. the EU and the ACP states, always have the last word.

Areas of participation

When it comes to areas of participation, NSAs are able to contribute more in some than in others. Rwandan NSAs did not hear from any thematic group in which they were supposed to participate. In Senegal, apart from some private sector organizations that were more frequently involved, the majority of NSAs gathered in just two thematic groups, i.e. the 'good governance' group and the 'NSAs' group, in which a programme for strengthening their capacities was included. Although good governance is a broad concept, possibly allowing NSAs access to other thematic groups, it is striking that they were not directly consulted in other domains, such as 'transport infrastructure', 'sanitation', macroeconomic and budget support', 'social sector: health', 'trade and EPAs' and 'regional programmes'. Some respondents pointed out that the NSAs themselves had chosen to combine forces in two thematic groups rather than diffuse their efforts over many, as they did not have enough capacity to do so. Yet, this cannot be true for all NSAs.

The role of the different actors involved in fostering quality participation

The above findings show the different dimensions that have to be taken into account when measuring the quality of participation. However, whether or not quality participation occurs depends on the environment in which it takes place and, hence, the willingness and capacity of the actors involved to deliver high-quality participation. The case study findings identify 'the government's political openness towards NSAs' and 'the NSAs' capacity to contribute to public policy-making' as two crucial factors influencing the above-measured quality of participation. The third actor involved, the EU, can stimulate both the government and the NSAs to play a facilitating role to enhance the quality of participation.

The EU and governments' political openness towards NSAs

In assessing the role the Union can play in opening up public policy negotiations to NSAs, two major issues require EU action. First, it is important that the distrust that often exists between government and CSOs is tempered. The EU can play a role in convincing governments about the importance of civil society involvement, although the power of the former is limited. Making CSO participation a condition for the Cotonou Agreement to be signed is a first, although not sufficient, step. The Agreement is a facilitating but not binding tool. Although the official parties have agreed to allow NSA participation, there are no strict

guidelines to ensure the quality of such participation. In addition, provisions on the budget spent on strengthening the capacity of NSAs are merely indicative and, as the case studies in Rwanda and Senegal show, they depend on the nature of the relationship between state and NSAs. Nevertheless, the case study in Senegal illustrates that government's distrust of civil society involvement, which is partly based on doubts as to the consequences this has for the government's own power, can be diminished by an EC Delegation investing time in clarifying what is implied by these changes to all parties involved, together and in separate meetings.

Second, allowing the government to select and invite a representative group of CSOs to participate in public policy negotiations is another issue that the EU should monitor. It is easier to convince governments to allow government-friendly CSOs to participate, but this does not guarantee quality participation. In the Cotonou Agreement, the EU has laid down a broad definition of NSAs (Article 6), but it remains up to each ACP state to give a more accurate interpretation of local CSOs active in the country. In order to select a representative set of civil society actors to participate, a mapping exercise is often carried out jointly by the EC Delegation and the government. Flaws in selection can easily undermine the entire participation procedure, so four issues should be taken into account in the selection process.

- *Private sector, economic and social partners, and civil society.* It is important when selecting NSAs to participate in the Cotonou Agreement that these organizations represent different types of sectors in society. Apart from private sector organizations, and economic and social partners, the 'civil society in all its forms' (Article 2) is particularly challenging. In Rwanda, very few actors were involved, and the majority of CSOs, representing a particular section of society and participating in a similar PRSP process, hardly knew what the Cotonou Agreement was about. In Senegal, one of the NSAs' main achievements in this Agreement so far has been the creation of the 'NSA Platform for the Monitoring of the Cotonou Agreement in Senegal', in which a wide variety of sectors are involved. The problem, however, is how to make a platform comprising such diverse actors with often conflicting interests operational. NSAs in Senegal have invested a lot of time and energy in the creation of the platform, because of the diversity of actors and, hence, opinions involved, so they did not contribute much to the content when developing the Ninth EDF Cotonou Agreement. It clearly unrealistic to identify one voice representing all these NSAs round the negotiating table, an element that may even be used by governments to formulate the 'one voice' as a condition for talking to NSAs in order to weaken civil society contributions.
- *Geographical areas.* Apart from different types of sectors, various geographical areas in the country should also be represented among the participating CSOs. Even in Senegal, where the EC Delegation and the government opted for a very open participation procedure, CSOs from the local regions were

not present in the negotiations because all meetings on the Cotonou Agreement were held in the capital, and local, often poorer and smaller, CSOs had neither the time nor the money to participate. The fact that communication between the national CSO present in the capital and its local counterparts in the regions does not flow accordingly adds to the problem of local representativeness. However, the case study in Senegal shows improvement. CSOs have found that the more a CSO can show that it is representing a huge group of people, the more it is heard at the national level. Together with their participation in the good governance programme, public policy participation has inspired many CSOs to put more effort into consulting their base. The EU could assist further in this by organizing meetings on public policy issues at the local level, as has been done for the PRSPs, or by reserving money for NSAs to strengthen links with their satellites in the field.

- *Experienced versus new participating actors.* The Cotonou Agreement has enabled many 'new' CSOs, which used to work merely on service delivery, to engage in public policy negotiations at the national level. For these less experienced actors in public policy-making, such as women's organizations in Senegal, the Cotonou Agreement has been an important eye-opener as regards influencing the priority-setting and budget lines for their specific domains from the beginning of the process. Nevertheless, not all NSAs are convinced of the usefulness of these new participating groups and their organization into a platform. Typically, well-organized CSOs with a history of public policy dialogue with the government, such as, for instance, the consortium for Senegalese NGOs, Senegalese farmer associations, trade union federations or employer organizations, do not really need a new platform to pressure the government. It is important to consider the consequences for, and opportunities and limitations of, those platforms that already exist before initiating new ones. In addition, a few NSAs question the need for a different platform for each agreement and have initiated their own NSA group for participating in public policies in general, i.e. not tied to one specific agreement. Nevertheless, the fact that the initiation of a platform for the Cotonou Agreement has been a trigger for the creation of independent initiatives on influencing public policy-making is positive.
- *Political versus apolitical actors.* A final issue when selecting representative CSOs to participate in public policy-making is their independence from government and, linked to this, their ability to take up the role of critical observer to whom a government can be held accountable. The concern of a state selecting only government-friendly NSAs appears to be valid in some cases. In Rwanda, for instance, the government invited CSOs to meetings on the Cotonou Agreement, although most of the time this meant inviting only a few 'collectives of CSOs', most of which were initiated by the government itself. Of course, the extent to which CSO personnel may be co-opted by the authorities depends to a large extent on the political openness of the country, as mentioned above. In Senegal, a more independent and diversified group of NSAs participated in the Cotonou Agreement negotiations.

The EU and NSAs' capacity to contribute to public policy-making

Whereas the political openness of a government towards civil society participation is an important indicator of success as regards quality participation, it is equally important that the CSOs involved have the capacity to contribute to public policy negotiations. NSAs able to offer expertise to the government are more likely to be taken on board in public policy-making. Therefore, strengthening the capacity of NSAs to participate in public policy-making, as in the Cotonou Agreement, is very necessary. Both case studies in Senegal and Rwanda show that a majority of NSAs that are used to deliver services in the field have difficulties translating their experience and demands at the national policy level. Moreover, NSAs complain that the government gets more assistance for studying the subjects under negotiation than they do as they do not have the personnel, the time or the expertise to offer credible propositions for alternatives. The provision in the Cotonou Agreement to reserve a maximum of 15 per cent of the EDF for strengthening NSAs' capacities is positive, although the government decides how much will actually be provided. The success of this provision will also depend on how it will be put into practice. NSAs stress the importance of the projects being financed to move beyond mere information and training sessions to include guidance on how to use the information and skills obtained. The EU could play an important role in this matter.

EU relations with Latin America

The above findings on civil society involvement in the EU's external policies towards Africa have already indicated the different dimensions and actors required to make CSO involvement successful. Whether or not these also hold true in the case of EU–Latin America (LA) relations will be examined in this section. Unlike the above analysis of African policies at national level, EU–LA negotiations will be examined mainly at regional level, in particular in the case of the Andean Community (CAN).[2]

Institutional framework

The relations between the EU and Latin American countries on political/social, economic and development-related issues take place at various levels. The highest level is biregional involving the EU and LA as a whole, including the Caribbean (LAC); a second level is sub-regional, including the Mercosur, the CAN and Central America; and a third level concerns the bilateral relations between the EU and specific countries on particular topics. The relations between the EU and Caribbean countries are governed at the biregional level of EU–LAC relations and the EU–ACP Cotonou Agreement. Since 1999, the biregional summits have been taken place every two years. The most recent biregional summit in Vienna (2006) focused mainly on the promotion of intra-regional integration and the launch of the Association Agreements with the CAN and Central America. The negotiation of these Agreements involves the gradual conversion of the existing political

dialogue, co-operation agreement and GSP to an overarching agreement encompassing the three pillars of EU relations with LA: trade integration, political/social dialogue and development[3] (Hurt 2006). In addition, every two years in the period when there is no EU–LAC summit, the EU meets with the Rio Group, encompassing all Latin American countries and representatives of the Caribbean countries.

More especially at the level of the EU–CAN, the relations between both parties are defined by the Political Dialogue and Co-operation Agreement that was signed in Rome (2003) but never ratified by all the member countries. Both parties agreed at the Guadalajara Summit (2004) to take further steps in concluding an Association Agreement that will not only include relations on political dialogue and co-operation, but also the increasing economic integration between both regions. At the moment, trade relations between the EU and the CAN are governed by the special Generalized System of Preferences Plus (GSP-plus) initiative (see Chapter 9), as part of the more general GSP system. The latter means that Andean countries receive tariff preferences on particular exports to the EU. Since 2006, the Andean countries have been part of the GSP-plus framework, which provides additional tariff preferences for developing countries, ratifying and implementing a number of core international labour and human rights, environmental protection and good governance conventions. One important issue for the future is the interest expressed by the CAN to be part of the South American Community of Nations, which would be the Latin American regional association bringing the CAN, Mercosur, Chile, Suriname and Guyana more closely together (CAN 2007a).

The EU Regional Strategy Paper for the CAN, agreed in April 2007, defines the co-operation relationship with the region for the period 2007–13, highlighting three main elements, i.e. strengthening intra-regional integration, enhancing social and economic cohesion and assisting the region in its fight against illicit drugs. For the period 2002–6, the EU assisted the Andean countries through country and regional co-operation with up to 408 million euros, and decided to support the Andean countries in the period 2007–13 with up to 713 million euros. Of this latter sum, 50 million euros will be allocated to the Andean region, and the remainder will go directly to the countries. Apart from co-operation at the country and sub-regional level, the Andean countries also share in the co-operation budget at the LAC region level.

Civil society involvement: discourse or reality?

The importance of civil society involvement for EU–LA relations was underlined at the most recent Vienna EU–LAC summit (2006): ‘We recognize the importance of promoting corporate social responsibility, fostering social dialogue and the participation of all relevant actors, including civil society, and to respect ethnic diversity, to build more cohesive societies’ (European Commission 2006b). Accordingly, in the weeks before the Vienna Ministerial meeting, a variety of *ad hoc* participatory initiatives were organized for CSOs and business representatives.[4] In preparation for the 2008 EU–LAC Summit in Lima and the follow-up

of the EU–CAN negotiations of an Association Agreement, CSOs, governments, parliaments and the EU and CAN authorities have taken initiatives to involve civil society actors.

Apart from the above-mentioned *ad hoc* initiatives regarding civil society involvement, the EU and the CAN have various institutionalized mechanisms to enable a more systematic civil society involvement. This is also explicitly mentioned in the Political Dialogue and Co-operation Agreement between the EU and the CAN. It points out that a Joint Consultative Committee shall be established that will comprise the European and Andean CSOs (Article 52). The Agreement also refers in particular to the strengthening of indigenous representative organizations, such as the previous working group on the rights of indigenous peoples (Article 45). At the level of the CAN, the most important institutionalized channels are the Andean Labour Advisory Council (ALAC) and the Andean Employers Advisory Council (AEAC), which are the official advisory bodies representing the interests of the traditional social partners. Non-traditional CSOs are represented via two working groups: one on consumer rights and one on the rights of indigenous people. However, as both working groups have not worked properly in the past, the latter became the Consejo Consultivo de los Pueblos Indígenas de la Comunidad Andina in September 2007. This will be the official interlocutor between the CAN and indigenous organizations, encompassing the major indigenous bodies of the four Andean countries and four regional organizations with observer status. As this is a very recent initiative, it is too early to judge its effectiveness. In relation to the involvement of non-traditional CSOs, the ALAC and AEAC proposed starting a debate with the CAN authorities on the creation of an Andean Economic and Social Committee (AESC), based on the EESC model.[5] The AESC would include, besides the existing ALAC and AEAC, a third group representing the diverse group of other CSOs. At the moment, however, its creation remains uncertain (Draft Memorandum of Understanding 2005; CCLA 2006). Another participatory body is the Simón Rodríguez Convention, which is a tripartite forum of debate at the level of the CAN. Currently, however, it is not working as it has not been ratified by the member countries (EESC 2006b). In addition, less institutionalized participatory mechanisms exist at the regional level of the CAN. The CAN programme, Plan Integrado de Desarrollo Social, mentions including consultation with indigenous people and those of African descent on educational programmes (Adiwasito *et al.* 2006). In addition, the Andean Academic and Social Organizations Network, including academic and other social organizations from the four member countries, was created to assist policy-makers in the Andean and South American integration process (CAN 2007a, b). And, in the actual negotiation process of the EU–CAN Association Agreement, *ad hoc* informative meetings with CSOs are being organized.

The existence of these mechanisms to foster the participation of civil society at the regional level of the CAN and in EU–CAN relations does not mean, however, that the formulated objectives on civil society involvement are being achieved. There are very significant differences among the various CSOs and in the quality of participation. Whether the civil society participation the EU is supporting in its

internal policies can also work in its relations with Latin America depends to a great extent on the characteristics of civil society and governments, and the way in which the EU is able to influence them. However, before examining the role the different actors play in enhancing the quality of participation, the dimensions that determine this quality are discussed.

Defining quality participation

Institutionalizing participation

The participating organizations of the three main EU–LAC civil society fora at the 2006 Vienna Summit (the III European–Latin American–Caribbean Civil Society Forum, the Fourth Meeting of European Union–Latin American–Caribbean CSOs and the Third EU–LAC Trade Union Summit) argue that, if the EU claims to foster quality civil society involvement, this cannot be constrained to *ad hoc* meetings but has to be conceived as part of a longer and more institutionalized process. Similarly, Grügel (2004) finds in the case of EU–Mercosur relations that CSOs often participate through *ad hoc* meetings, resulting in a more ceremonial rather than substantive involvement of civil society. Bessa-Rodriguez (2006) argues in the same vein, stating that civil society involvement in EU–Mercosur relations has been sporadic rather than systematic and based on political discourse rather than effective action. With regard to EU–Peru relations, the CSP 2007–13, pointing out guidelines for future co-operation between the EU and Peru, is criticized on the aspect of civil society involvement, as fast, superficial and having limited impact (Valderrama 2007). Referring to the actual negotiations of the Association Agreement between the EU and the CAN, civil society involvement is not institutionalized either at the CAN regional level or at the national level of the four member countries. To date, the existing institutionalized channels at the CAN regional level have not been consulted in relation to EU–CAN negotiations. At the national level, civil society involvement differs in the four countries. Some, such as Bolivia, have had a more thorough consultation on civil society than others, such as Peru. There is no financing to follow the negotiation rounds and no permanent committee of CSOs that is recognized and consulted by their governments.

Level of intensity of participation

Civil society involvement in EU–CAN relations is generally limited to information sharing. This is also the case for the actual negotiations concerning the Association Agreement – and even this is often limited. With the argument of avoiding endangering the position concerning negotiations among the CAN governments, information is hardly ever made public. Therefore, CSOs complain that they lack information. Some consultative bodies, such as the EESC and the ALAC, have the right to write an opinion on the negotiations between both regions. However, there is no assurance that their position will be taken into consideration. For instance, in

the history of the ALAC, only once has the CAN asked the ALAC for an opinion, whereas over thirty opinions have been written on ALAC's own initiative. Notwithstanding, the Political Dialogue and Co-operation Agreement between the EU and the CAN mentions that a Joint Consultative Committee, comprising the social partners of both regions, shall be established. However, this is far from reality. Pushing for a more comprehensive consultative process remains the challenge for the future. A step further in terms of intensity of participation is shared decision-making, but this is not an option within EU negotiations as the governments of both regions remain the main negotiating partners with the last word in the decision-making process.

Areas of participation

Some of the issues under negotiation, such as taxes, investments, tariffs, etc., are very technical. However, not many CSOs are invited to discuss, or have the necessary technical knowledge to be involved in, such topics. Hence, the majority tend to end up not being involved in technical and trade-related domains, but more in relation to the development chapter. This means that there is much less participation in issues such as the liberalization of trade and services, investment or intellectual property rights that really matter and will have the biggest impact on the Andean countries. The domains where CSOs are allowed to participate deal with less technical and more normative, value-related issues, such as co-operation, human rights, democratization, migration, etc.

The role of the different actors involved in fostering quality participation

The different dimensions that have to be taken into account when measuring the quality of participation have already been discussed. However, whether or not quality participation occurs depends on the different actors (governments, civil society) and their respective openness and capacity. The EU is an additional actor, assisting both governments and CSOs to play this facilitating role.

The EU and the governments' political openness towards CSOs

In assessing the role the EU can play in improving the quality of civil society involvement in public policy-making, two major issues require EU action. First, socio-cultural and economic inequality, polarized interests and often authoritarian, centralized and clientelistic governments, in combination with bureaucratic administrations, have resulted in distrust between governments and CSOs (Roberts 1998; Bessa-Rodriguez 2006; Biekart 2007; Grügel 2007). However, this differs between the four Andean countries. The governments of both Ecuador and Bolivia came to power by means of broad social mobilizations, which brings expectations of their showing greater political openness towards certain CSOs. This has also been confirmed by the authors' observations (at least in the case of Bolivia)

in the negotiation process concerning the Association Agreement. On the other hand, the current Peruvian government takes action, such as a stricter control over NGOs or media campaigns against social organizations that criticize the government's mining policies, thereby showing less political openness towards CSOs. However, this may vary among ministries, political levels and CSOs. Knowing that these governments seem to be more open towards international actors, such as the EU, than towards their own civil society, the EU has a role to play in fostering their political openness.

Second, as governments are selective in identifying civil society actors to be involved in participatory mechanisms, the EU may find a role in monitoring the selection of CSOs to be representative of the population. The following groups of CSOs can be identified:

- *Private sector, economic and social partners, and civil society.* Freres and Sanahuja (2005) argue that business interests can access institutions in EU–LA relations more easily than other CSOs. This is also supported by Grügel (2004) in the case of EU–Mercosur relations, and confirmed by the authors' own findings in EU–CAN relations. Compared with CSOs, private profit actors are better organized, have more narrowly defined interests and an agenda that is closer to the government's agenda of trade liberalization. Differences can be observed, however, among governments of the Andean countries and among economic sectors.
- *Experienced versus new participating actors.* In the case of the CAN and EU–CAN relations, new participating actors with less experience in influencing public policy, such as indigenous organizations, do not have the same access to the policy-making process as more experienced and consolidated actors with a long history of involvement in policy-making procedures, such as trade unions or business representatives. This is also reflected in the limited functioning of the working group on the rights of indigenous people,[6] compared with the ALAC and the AEAC. On the other hand, these new actors may use a more dynamic discourse and strategies for influencing policies compared with the sometimes more ideological and bureaucratic experienced actors.
- *Political versus apolitical actors.* Hurt (2006) criticizes EU external policy on civil society involvement as ignoring the political nature of civil society. Accordingly, in the case of the CAN, it is the less controversial actors, such as service delivery or development NGOs, that face better access to the policy-making process than the more politicized actors, such as trade unions or worker organizations. This can be explained in the knowledge that the latter often participate in a more controversial and ideological discourse, and have a greater capacity to mobilize people and, hence, have less attractive negotiating partners. Notwithstanding the often smaller mobilization capacity of less political actors, such as networks of NGOs, they may achieve greater influence on policy using more subtle instruments such as technical expertise.
- *European versus Latin American civil society.* A similar logic can be applied to the difference in access between European and Latin American civil society.

In more general terms, Germani and Alberti (2005) and Sorj (2005) state that southern CSOs do not participate on equal terms in participatory mechanisms with international organizations. This is confirmed by Bessa-Rodrigues (2006) and Grügel (2004, 2007) in the case of EU–Mercosur relations. In the case of the CAN, it has been shown that European NGOs have greater access to financing and expertise on the issue which, in turn, facilitates participation in the policy processes (see Chapter 11).

EU and CSOs' capacity to contribute to public policy-making

Whereas the government is an important actor in ensuring quality participation, and the EU has a role to play to enhance government openness towards CSOs, it is equally important that the CSOs involved have the capacity to contribute to public policy negotiations. Trade unions in the CAN, for instance, have difficulties in formulating a coherent agenda towards EU–CAN negotiations, among them the most important trade unions for each country and for the Andean region. The same can be said for the Andean indigenous and worker organizations. Because of the existing diversity in one country, and even more so in the Andean region, they have difficulties in drawing up a common agenda for negotiating the Association Agreement. In addition, the other CSOs that are participating in preparations for various civil society fora in the 2008 Lima summit do not always have the experience, expertise and common interests to be able to participate with a coherent and well-developed agenda in participatory mechanisms. Participation is a learning process, however, and CSOs learn and achieve the necessary skills while being involved. The EU also has a role to play here in fostering the capacity-building of weaker CSOs and by inviting a broad array of organizations, enabling them to achieve the necessary skills.

Coherence and consistency?

It can be concluded that, in recent years, the EU has, at least formally, committed to a greater effort to strengthen the social dimension in its external policies towards developing countries, and to improve the consistency between the social/political, trade and development dimensions of these policies. Provisions concerning the involvement of civil society in the promotion of this social dimension through social and civil dialogue with governments in EU partnership agreements have been shown to offer interesting opportunities. Nevertheless, the case study findings for Africa and Latin America show that the degree of success of this civil society involvement differs extensively, depending on country-specific and domain-specific indicators and the way in which the different actors involved have the will and/or power to influence them.

First, an answer was sought to the question on internal and external EU policy coherence, in particular, to what extent civil society involvement, as in the Union's internal affairs, could be used in the EU's external relations in order to strengthen the social dimension of Union policies? The quality of this civil society

participation was put at the centre of the current analysis. Having identified three dimensions to define the quality of participation, i.e. institutionalizing participation, level of intensity of participation and domains of participation, this analysis focused on the role the different actors played in fostering this quality participation. The case study findings identified the government's political openness towards CSOs and the CSOs' capacity to contribute to public policy-making as two crucial factors that can influence the above-measured quality of participation. Both indicators are country specific depending on the extent to which the government is committed to civil society involvement and the extent to which CSOs are capable of contributing to policy-making, as well as on the extent to which the EU manages to influence them.

As regards the government's political openness towards CSOs, the EU has favoured such openness by formally including it in its external policies towards developing countries and by facilitating the first steps of putting together two actors who may often be sceptical of one another. However, as the different outcomes for Senegal and Rwanda show, the final decision on the selection of CSOs and the degree to which they are incorporated in the negotiations lies primarily with the government, and this decision is highly intertwined with the nature of the relationship the government has with civil society. Data from the CAN region indicate clearly that one civil society does not exist. It is a group of various organizations that differ to a great extent. Hence, to achieve quality participation, it is simply not enough to take one of these groups on board – most likely the less politicized or most pro-government groups – civil society in all its diversity and representative of the different groups in society must be involved.

As regards the capacity of civil society organizations to contribute to public policy-making at national and regional level, the case study data show that, if CSOs can offer the expertise the government needs, the latter will be more likely to engage these CSOs. But even in a less co-operative environment, it is important for CSOs to have the capacities they need in order to translate their often local and service delivery expertise into public policy language at a higher national level, and to support the alternatives they offer with valuable arguments. Although the EU has an important role to play in strengthening these capacities, in many cases, it does not do enough to succeed.

Second, this paper questioned the consistency between the increased social/political dimensions of the EU's external policies, on the one hand, and its other domains, i.e. development and trade, on the other. As the current case studies have taken different entry points in their analysis, with the African one focusing more on development policies negotiated at the national level and the Latin American study putting trade negotiated at the regional level at the centre, the impression that might be created of the EU being much stricter with civil society involvement in Africa than in Latin America is a false one. A better explanation can be found in the different domains in which civil society participation is promoted. Here, the EU has far fewer difficulties in applying its rhetoric of increased social and political engagement in its external policies on a soft policy, such as development, than on a harder one such as trade, where many more interests for both the EU and

local governments are at stake. If the EU is serious about the importance of civil society being involved in public policy-making, it will need to invest in the consistency of civil society involvement, i.e. present in all the pillars of its external policies towards developing countries.

Notes

1 The data on which the findings in this paper are based were gathered in Brussels and in the Andean countries during several field visits between May 2006 and November 2007.
2 The CAN is a regional intergovernmental association which, based on the Cartagena Agreement (1969), currently encompasses four countries: Peru, Bolivia, Ecuador and Colombia. Venezuela left the Andean Community in 2006. Chile, Argentina, Brazil, Paraguay and Uruguay are associate members. Mexico and Panama are observer countries.
3 EU policy documents generally speak of co-operation instead of development.
4 The most important bodies were the following: the 1st EU–LAC Business Summit, offering a participatory channel for European and Latin American business associations; the 3rd EU–LAC Trade Union Summit, offering a voice to the trade unions of both regions; the III European–Latin American–Caribbean Civil Society Forum, organized by a group of Latin American and European NGOs; the Fourth Meeting of European Union–Latin American–Caribbean Civil Society Organizations, organized by the European Economic and Social Committee (EESC) and inviting mainly the counterparts of the EESC in LA (such as the ESC of the Mercosur, ESC of Central America and the Andean Labour and Employers' Advisory Committees); and the Enlazando Alternativas II, organized by a wide array of social movements, grassroots organizations and NGOs (EESC 2006a).
5 V Reunión Conjunta del Consejo Consultivo Empresarial Andino y del Consejo Consultivo Laboral Andino, Lima, November 2004.
6 This has now become the Consejo Consultivo de los Pueblos Indígenas de la Comunidad Andina.

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13 The EU's international promotion of the rights of the child

Ian Manners

As the previous contributions to this book have illustrated, both human rights and social issues are deeply implicated in the interdependence between the European Union (EU) and the social dimension of globalization. The emphasis in this chapter is on the EU's international promotion of the rights of the child, a subject that brings together questions of EU governance, globalization, human rights and social issues. The issue of the rights of the child fundamentally challenges the sort of internal–external distinctions that structure most of our ways of thinking about the social dimension of globalization. The techno-global pleasures of our everyday lives, whether it is mobile communications, the internet, cheap clothing or the global travel that we so frequently enjoy, are precisely the kinds of products and activities that can act against the rights of the child (RoC).

As this chapter appears at the end of the volume, there is a temptation to think that children's rights are not as important as labour rights, corporate responsibility or trade policies. In contrast, I argue that, as children represent the most vulnerable social citizens in the world, the RoC is one of the most important cross-cutting issues in the EU today, similar to questions of gender or the environment (in relation to gender, see Chapter 11). For me, the rapidly evolving question of the RoC, following the mainstreaming of sustainable development and gender in the 1990s, raises interesting questions about whether the EU is becoming a more normative power (Manners 2002, 2008a). However, as the final chapter, it is also clear that the issue of the RoC involves many, if not all, of the themes encountered in the book so far. With this in mind, this chapter will also try to highlight the many interlinkages between the major themes developed throughout the book within the context of the RoC.

In this chapter, I will consider how and why the promotion of the RoC has risen so quickly up the agenda of the EU and the social dimension of globalization over the last ten years. I will do this first by briefly considering the historical development of the internal and international commitments to the RoC. Second, I shall look at four examples of EU promotion of the RoC, including extra-territorial legislation, the Charter of Fundamental Rights, the abolition of the death penalty, as well as poverty and social exclusion. Finally, I will look at the latest developments involving the Commission's proposed EU Strategy on the Rights of the Child (2006). In this concluding section, I shall also look at how all these developments

can been seen as illustrative of the themes of multilateral coherence, vertical coherence and the role of soft versus hard instruments of promotion when considering the EU and the social dimension of globalization. As I shall discuss in the conclusion, assessing the EU's principles, actions and impact in the case of the RoC is challenging given the need for a holistic and integrated approach to such a cross-cutting issue.

Historical development of the rights of the child in the EU

> 3. The Union…shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and *protection of the rights of the child.*
> 4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in *particular the rights of the child*, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
>
> Lisbon Reform Treaty (emphasis added)

As the bold objectives from the December 2007 Lisbon Reform Treaty illustrate, the treaty introduces two new references to the RoC under the Union's amended Article 3 'objectives'. While the European Commission (EC) and EU treaties hardly mentioned children (with the single exception of Article 29 of the Treaty of the European Union on 'Provision on Police and Judicial Cooperation in Criminal Matters' included at Amsterdam), the Lisbon Treaty raises the RoC to one of the normative principles for protection within the Union (amended Article 3-3) and promotion in relations with the wider world (amended Article 3-4). Given that, before 1996, children were absent from the EU legislation, the question immediately arises of how the RoC became a normative principle so quickly, as the proposed 2006 EU Strategy on the RoC and the 2007 Lisbon Treaty now demonstrate. There are two sides to the evolution of the normative principle of the RoC – the internal development of children's rights and international developments such as the 1989 United Nations (UN) Convention on the Rights of the Child (CRC) – although these are not easily separable sides of the story.

The internal development of children's rights

The internal development of children's rights came as the result of Commission regulation and European Court of Justice (ECJ) interpretations of labour mobility and the free movement of persons (Stalford 2000: 105–7; McGlynn 2002: 388–89). Helen Stalford and Clare McGlynn both point to the achievement of recognition of children as obstacles to free movement and how children were given

entitlements in order to overcome such obstacles.[1] Subsequently, a series of ECJ cases provided and extended children's Community law entitlements, including family allowances, unemployment benefits and educational support.[2]

The treaty base was extended in the 1997 Treaty of Amsterdam to reflect these internal developments of the RoC. As Sandy Ruxton puts it, 'the Amsterdam Treaty provided the first significant impetus to the development of an EU children's policy' (Ruxton 2005: 20; see also Ackers and Stalford 2004). Thus, Article 13 of the consolidated EC treaty provides the basis for action to combat discrimination based on age, while Article 29 of the consolidated EU treaty makes offences against children a focus of common action in the field of police and judicial co-operation in criminal matters. Less obviously, the social provisions undertaken on the basis of Article 137 of the consolidated EC treaty identified the need to support member state activities in the area of social policy, including combating social exclusion and youth-focused policies (Article 149 of the consolidated EC treaty).

Since the Amsterdam breakthrough in the internal development of children's rights, there are signs of increasing importance given to the RoC within the EU, particularly within external relations (Ruxton 2005: 24). Helping to maintain this momentum have been six EU-related institutional structures: the Childhood and Adolescence Intergovernmental Group ('L'Europe de l'Enfance') established by the 2000 French Presidency; the Commissioners' Group on Fundamental Rights, Equality and Non-Discrimination established by President Barroso in 2005; the Commission Interservice Working Group on Children and the Informal Inter-Institutional Group on Children; the EU Agency for Fundamental Rights established in 2007; the European Parliament's Children's Rights Alliance; and, finally, the dense network of Brussels-based non-governmental organizations (NGOs) led by Euronet, the European Children's Network. In over thirty initiatives developed by the EU over the last ten years, an emphasis has been placed on children's issues in eleven diverse areas identified by the Commission in its 2006 document providing a 'Preliminary Inventory of EU Actions Affecting Children's Rights' (European Commission 2006a).[3]

While all these institutional structures and areas are important, the emphasis in the rest of this chapter will be on the international promotion of the rights of the child, with a focus on extra-territorial legislation, the Charter of Fundamental Rights, the abolition of the death penalty, as well as poverty reduction and addressing social exclusion.

The international development of children's rights

The international development of children's rights has accelerated since the Universal Declaration of Human Rights 1948 (in particular Articles 25 and 26), with the indivisibility of political and social rights being proclaimed through both UN and International Labour Organization (ILO) conventions. During the 1960s and 1970s, the RoC were identified in the UN core human rights instruments as developed in the 1966 International Covenant on Civil and Political Rights (especially

Article 24) and the 1966 International Covenant on Economic, Social and Cultural Rights (especially Article 10). Similarly, the ILO Minimum Age Convention 1973 (No. 138) contributed to this development. However, it was to take until the 1989 UN Convention on the Rights of the Child to provide 'a clear set of principles and standards to guide the development of a clear and ambitious vision for the realisation of children's rights' (Ruxton 2005: 28). What is noticeable from this period of rights development is the way in which, despite pronouncements on the indivisibility of rights, until the 1989 Convention on the Rights of the Child, these rights became enshrined and pursued separately with the UN conventions focusing on more political rights, while the ILO conventions was developing more economic rights (see Chapter 1). This tension between political, social and economic objectives during the Cold War reflected the failure of horizontal coherence in the pursuit of rights, with particularly damaging effects on the RoC.

Following the 1989 Convention on the Rights of the Child and the end of the Cold War, the impact of the 1994 International Conference on Population and Development (Cairo) Programme of Action, the 1995 Fourth World Conference on Women (Beijing) Platform for Action and the 1996 First World Conference Congress against Commercial Sexual Exploitation in Stockholm all provided impetus for EU action in the international development of children's rights (Alexander *et al.* 2000; European Commission 2006a: 1, 2007a: 1). Such an agenda began to be realized within the EU with the 1996 Commission Communication on Combating Child Sex Tourism (European Commission 1996), the 1997 Council Recommendation on Protection of Minors, the 1997 Justice and Home Affairs (JHA) Joint Action to Combat Trafficking in Human Beings and the Sexual Exploitation of Children and the 1999 Commission Communication on the Implementation of Measures to Combat Child Sex Tourism. Internationally, the momentum came from the ILO Convention on the Worst Forms of Child Labour 1999 (No. 182) and the 2000 UN Optional Protocols to the Convention on the Rights of the Child on Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography. Also in 2000, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, was adopted.

The combination of these internal and international agenda led to the 'more proactive approach' of the EU to the RoC in the 2000s (Ruxton 2005: 24). This approach includes, for example: addressing children's rights in the EU Development Policy 'The European Consensus' (EU 2006); the inclusion of articles on children, conflict prevention and human rights in EU trade and co-operation agreements (including the 2000 Cotonou Agreement); the promotion of children's rights in the 2001 'European Initiative for Human Rights and Democracy'; and, most visibly, in the 2003 'EU Guidelines on Children and Armed Conflict' (Council of Ministers 2003). In addition, the EU tries to promote international conventions such as the 1989 Convention on the Rights of the Child and its two optional protocols, as well as the ILO core labour standards, including Convention Nos 138 and 182 (see Chapter 1) through positive conditionality in its accession procedures (see Chapter 3), the European Neighbourhood Policy (see Chapter 4) and

the Generalized System of Preferences 'plus' policy (see Manners 2008b; Chapter 9). Here, we can see the role of enhanced co-operation between the EU and ILO as being important in ensuring multilateral coherence on the RoC. The combination of the entry into force of the Treaty of Amsterdam and ILO Convention No. 182 in 1999 brought together the internal and international sides of the EU's promotion of the RoC to provide the grounds for such enhanced co-operation with an emphasis on Europe's neighbourhood. A further dimension to such multilateral coherence is added by activism within the UN, in particular with the two optional protocols to the Convention on the Rights of the Child in 2000.

From this brief historical overview of the development of the RoC in the EU, it is possible to trace both the internal and the international development of rights over the last two decades to the 2006 Commission Strategy and the 2007 Treaty of Lisbon. What is crucial to note is that these two areas of rights development are now deeply interdependent with the post-Cold War human rights agenda bringing together political and social rights – both Amnesty International and Human Rights Watch now speak of the 'circle of rights'. Thus, the post-Amsterdam period has seen the EU gradually emerge as a bridging organization in facilitating horizontal coherence and vertical coherence in the case of the RoC. In bridging the gaps between children's rights in terms of commercial and sexual exploitation, in terms of economic development and in terms of involvement in armed conflict, the EU is helping to improve horizontal coherence across economic, social and political objectives. In parallel, in bridging the gaps between ILO (and UN) activism on the RoC, the EU contributes to enhanced co-operation and improving multilateral coherence. The question arises here whether the EU and its member states are willing and able to promote the RoC internationally in an era of globalization? I will now attempt to address this question by looking at four case studies in the EU's international promotion of the RoC. These case studies are interesting because they allow us to compare the EU's use of soft versus hard instruments of promotion, although such a distinction is problematic.

Examples of the EU's promotion of the rights of the child

Extra-territorial legislation

> It appears opportune to draw their [member states] attention to two key elements in combating child sex tourism – namely, the possibility of giving national courts *extra-territorial jurisdiction* for offences and crimes committed against children abroad, even where the presumed offence or crime is not provided for under the laws of the country in which it was committed.
>
> European Commission (1996: 5, emphasis added)

Although the 1989 Convention on the Rights of the Child provided an international basis for the RoC, its attempts to protect children from commercial sexual exploitation, in particular Article 34, were considered inadequate. The first response to this absence of adequate protection against combating such exploitation was

the First World Congress against Commercial Sexual Exploitation of Children in Stockholm in 1996 organized by ECPAT (End Child Prostitution in Asian Tourism), United Nations Children's Fund (UNICEF), the NGO group for the UN Convention on the Rights of the Child and the Swedish government (Alexander *et al.* 2000: 482). The Stockholm conference was held weeks after public outcry against the activities of Marc Dutroux in Belgium,[4] and provided an impetus for concerted EU action against increasing commercial sexual exploitation of children. The resulting Stockholm Declaration and Agenda for Action, together with the advocacy of ECPAT in the EU, led the Irish Presidency to push for EU action in particular through new policy initiatives and in the Amsterdam Treaty.

Following Stockholm, the first EU action to prevent the commercial sexual exploitation of children was the November 1996 Commission Communication on Combating Child Sex Tourism. As the quote from the Communication (above) illustrates, following the Stockholm Agenda for Action and the arguments of ECPAT, the Commission advocated the use of extra-territorial legislation by national courts to deter and punish child sex abusers (ECPAT 1996; European Commission 1996; Alexander *et al.* 2000: 484). The Communication on combating child sex tourism was followed by the key initiative of the 1997 JHA Joint Action to Combat Trafficking in Human Beings and Sexual Exploitation of Children (Council of Ministers 1997), as well as the 1997 Commission Communication on Protection of Minors and Human Dignity in Audiovisual and Information Services (European Commission 1997), the 1999 Commission Communication on the Implementation of Measures to Combat Child Sex Tourism (European Commission 1999) and, following the entry into force of the Amsterdam Treaty, the 2003 Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography (Decision 2004/68/JHA).

The EU's advocacy of extra-territorial legislation to combat the commercial sexual exploitation of children has generated considerable debate, particularly over the distinctions made between child and adult sexual exploitation, between different forms of abusers and between different types of tourism (see Seabrook 2000; Jeffreys 2002; O'Connell Davidson 2004). However, the recent response by the European Parliament to the Commission's 'Towards an EU Strategy on the Rights of the Child' illustrates the extent to which the Commission, the Council's joint actions and the European Parliament are all committed to extending extra-territorial legislation, including the use of Europol, as part of the international promotion of the rights of the child:

> 75. Calls for the effective protection of children against sexual exploitation including by considering sex tourism involving children as a crime in all the Member States and by making it subject to *extraterritorial criminal laws*; calls for any citizen of the Union committing a crime in a third country to be dealt with under a single set of *extraterritorial criminal laws* applicable throughout the EU, in accordance with the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;

> 76. Calls for Europol to be duly mandated to cooperate with the police forces of Member States and countries affected by this type of tourism in order to conduct investigations with a view to identifying those responsible for such crimes and to this end calls for the creation of European liaison officer posts; calls for adequate measures for the rehabilitation and social integration of the victims of sexual exploitation who have been liberated from their exploiters; calls as well for more comprehensive information on child sex tourism in the Member States;
>
> European Parliament (2008, emphasis added).

Charter of Fundamental Rights

> Article 24 – The rights of the child
>
> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

The December 2000 Charter of Fundamental Rights of the European Union included, for the first time in EU treaties and declarations, a statement of children's basic rights. Euronet argue that the Charter 'goes well beyond the rights for children set out in the 1950 European Convention on Human Rights, which only refers directly to education' (Ruxton 2005: 21). Besides Article 24 on 'The Rights of the Child' (above), the Charter also explicitly refers to children and age description in Article 14 – right to education; Article 21 – non-discrimination; Article 32 – prohibition of child labour and protection of young people at work; and Article 33 – family and professional life (McGlynn 2002: 392–94; Ruxton 2005: 21–22).

As a 'solemn proclamation', the Charter did 'not establish any new power or task for the Community or the Union' (Article 51), but was soon being used to clarify the 'fundamental rights' referred to in Article 6-2 of the consolidated Treaty on European Union. This 'legal status for an EU strategy' based on the Charter is made explicit in the 2006 Commission Communication 'Towards an EU Strategy on the Rights of the Child', which states that 'the Charter of Fundamental Rights, independently of its legal status, may be seen as a particularly authentic expression of fundamental rights guaranteed as general principles of law' (European Commission 2006b: 3).

As I argued at the beginning of the 2000s, the Charter must be considered part of the EU's normative basis, independently of its legal status (Manners 2000: 33–34; 2002: 243–44). The Rights of the Child in Article 24 came to assume

importance because of the way in which the Charter shaped Article 2 ‘values’, Article 3 ‘objectives’ and Article 10 ‘general provisions on the Union’s external action’ in the 2007 Lisbon Treaty. Hence, we find the Charter being used in the Commission Staff Working Document (European Commission 2006c) as a source of rights within the EU, as well as informing EU actions affecting children’s rights in acceding, candidate, potential candidate and neighbouring countries and in the wider world (including political dialogue, trade negotiations, development assistance, humanitarian assistance and future instruments in the Community’s external policies) (see also Fierro 2001; Schwellnus 2006).

Abolition of the death penalty

> **Justice Kennedy.** Let – let’s focus on the word ‘unusual’. Forget ‘cruel’ for the moment, although they’re both obviously involved. We’ve seen very substantial demonstration that world opinion is – is against this, at least as interpreted by the leaders of the *European Union*. Does that have a bearing on what’s unusual? Suppose it were shown that the United States were one of the very, very few countries that executed *juveniles*, and that’s true. Does that have a bearing on whether or not it’s unusual?
>
> Supreme Court of the United States (2004: 14, emphasis added).

Besides the role of extra-territorial legislation and the Charter of Fundamental Rights, the third example of the EU’s international promotion of the rights of the child comes from the EU’s international pursuit of the abolition of the death penalty. As the extract from the landmark 2005 US children’s right to life case *Roper v Simmons* illustrates,[5] the majority of the Supreme Court believed that the EU’s commitment to abolishing the death penalty, together with other evidence, constituted a ‘very substantial demonstration’ of world opinion on unusual punishment (see discussion in Manners 2006: 79–81). The EU position, as set out in the *amici curiae* brief presented to the Supreme Court by Richard Wilson, was that Article 37a of the 1989 Convention on the Rights of the Child recognizes that ‘neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’ (Wilson 2004).

What is particularly interesting about the EU’s advocacy, and the subsequent deliberations by the Supreme Court, is that the US and Somalia are the only states not to have ratified the Convention on the Rights of the Child (Kennedy 2005: 22). However, despite ratification, some countries continue to execute children, as the recent statement by the Slovenian Presidency of the EU makes clear:

> *Declaration by the Presidency on behalf of the EU concerning death sentences in Iran*
>
> The EU notes that these executions are a direct contravention of the Islamic Republic of Iran’s international commitments, specifically the International

> Covenant on Civil and Political Rights and the Convention on the Rights of the Child, both clearly prohibiting the execution of minors or people who have been convicted of crimes committed when they were minors.
>
> Presidency of the EU (2008)

Obviously, the declaration raises international concerns over the tragedy of a signatory to the Convention on the Rights of the Child executing children by a method involving them being 'thrown from a height' off 'a cliff' (Presidency of the EU 2008). But it also illustrates how the EU has sought to widen the international promotion of the RoC by including candidate countries (Turkey, Croatia and Macedonia), countries of the Stabilization and Association Process (Albania, Bosnia and Herzegovina, Montenegro, Serbia) and European Free Trade Area (EFTA) countries (Iceland, Liechtenstein and Norway), as well as Ukraine, Moldova and Georgia in the declaration.

Since 1998, the EU's promotion of the international abolition of the death penalty, in particular through Optional Protocol 2 to the International Covenant on Civil and Political Rights, has been part of a global movement with that has met with considerable success. In the ten years since the 1998 EU abolitionist policy was launched, thirty-two states have moved to abolish the death penalty for ordinary or all crimes, bringing the total number of abolitionist states to 135 against sixty-two retentionist states (Amnesty International 2008a). Unfortunately, in the same period, Amnesty International have also recorded forty-two executions of child offenders, largely by Iran (twenty-one) and the USA (twelve) until the 2004 *Roper v Simmons* case (Amnesty International 2008b).

Poverty and social exclusion

> Of the 2.2 billion children in the world, 86% live in developing countries and over 95% of the children dying before the age of five, lacking access to primary education or suffering forced labour or sexual abuse are also located in these countries. Over half of all mothers in the world lack adequate rights including care during pregnancy and childbirth. This situation handicaps the future of many children from the moment of birth.
>
> European Commission (2006b: 4)

The final example of the EU's international promotion of the RoC considered here is the most challenging as it involves addressing poverty and social exclusion among millions of children across the world. As the extract from the Commission's 2006 Communication 'Towards an EU strategy on the Rights of the Child' illustrates, drawing on UNICEF's *State of the World's Children* report, child poverty and death is a development issue of enormous significance. The issue of child poverty and social exclusion is also interesting because of the way in which it cuts across the prevailing distinctions between EU citizens, third country nationals and developmental issues. This cross-cutting nature of RoC concerns is seen across

the wide variety of Commission, Council and Parliament documents addressing children's issues where 'a comprehensive strategy' is needed 'to effectively promote and safeguard the rights of the child in the European Union's internal and external policies' (European Commission 2006b: 2).

In the Commission's 'Preliminary Inventory of EU Actions Affecting Children's Rights', child poverty and social exclusion are addressed on the basis of EC Articles 136, 137 and 140, as well as on the basis of the European Consensus on Development (EU 2006) with reference to the Millennium Development Goals (MDGs). The Commission's Inventory furthermore draws rights from both the EU Charter of Fundamental Rights (Articles 5, 20, 21 and 34) as well as the UN Convention on the Rights of the Child (Articles 2, 6, 24, 26, 27, 28, 30 and 31) as 'particular competences under the Treaties [which] do allow taking specific positive action to safeguard and promote children's rights' (European Commission 2006c: 3–4, 22). A number of documents help to illustrate the cross-cutting nature of this 'comprehensive strategy' with the practices of mainstreaming children's rights into the programming guidelines of developing country strategy papers (European Commission 2006a); the millions of euros contributed to eighty-seven Children and Armed Conflicts-related EU projects (Council of Ministers 2003; European Commission 2007b); and the 'holistic approach to children's rights' of the forthcoming Action Plan on Children in External Relations (European Commission 2007a).[6]

Such a wide variety of approaches to addressing child poverty and social exclusion are not without criticism. For example, the National Action Plans on Inclusion promoted in the Lisbon Strategy have been criticized for their weakness on child poverty and social exclusion. Activists have gone further to create their own index of child well-being based on fifty-one indicators (Bradshaw *et al.* 2007). Activists have also used the actions plans as part of promoting a rights-based approach and towards acknowledging the UN Convention on the Rights of the Child in the 2006 Commission Strategy. In terms of addressing child poverty and social exclusion more globally, the European Commission's (2006b) Communication on the rights of the child awaits a response from the Council, while the Commission's (2007a) action plan on children in external relations remains in draft form. Thus, it remains to be seen how quickly the EU is willing and able to address child poverty and social exclusion, even though the 2015 deadline for the child-related MDGs (especially goals 2, 3 and 4) is just seven years away.[7]

What these four case studies illustrate is the increasing EU preference for a more comprehensive strategy and holistic approach to the promotion of the RoC. But distinguishing between the concepts of 'soft' versus 'hard' instruments such as legal processes, economic incentives or military force fails to capture the most important dimensions of principles, actions and impact in such comprehensive and holistic promotion. Here, the notion of 'normative power' is a far more appropriate way of judging the legitimate and illegitimate use of instruments in the promotion of the RoC, including extra-territorial legislation, positive conditionality informed by the Charter, *amici curiae* briefs presented in domestic courts and focusing development aid on achieving the child-related MDGs (see discussion of soft power versus normative power in Diez and Manners 2007: 179). However, in the cases

of extra-territorial legislation, the Charter of Fundamental Rights and abolition of the death penalty, there is clearly a preference for promoting the RoC through the use of legal instruments legitimized by the universally applicable claims of the UN CRC and the ILO conventions. In contrast, the case of poverty and social exclusion illustrates a preference for promoting the RoC through the use of economic instruments primarily legitimized by the universally applicable aims of the MDGs.

Conclusion: towards an EU strategy on the rights of the child

> An EU children's rights policy must be developed if the rights and interests of children are to be acknowledged and addressed within the EU. While the improved commitment we have seen since 1999 is welcome, children's policy cannot continue to be dealt with in an ad hoc way, addressing only 'extreme' forms of abuse or discrimination. The EU must adopt a holistic and integrated approach if we are to achieve our vision of a society where no child is forgotten or invisible. Only then can the EU become a champion for children on the world stage.
>
> Ruxton (2005: 11)

As the extract from Sandy Ruxton's (2005) report for Euronet (the European Children's Network) illustrates, a holistic and integrated approach to the RoC is crucial for the EU to address both human rights and social issues. Both the 1999 Euronet report, *A Children's Policy for 21st Century Europe: First Steps*, and the 2005 Euronet report emphasize the need for a holistic approach to children's rights both within and without the EU. As I have considered in this chapter, since 1999, the EU has accelerated its commitment to the international promotion of the RoC, but we shall have to wait for the commitments in the Treaty of Lisbon, the planned Towards an EU Strategy on the Rights of the Child and the Action Plan on Children in External Relations to become a reality before we can more fully judge the EU as a normative power.

In this chapter, I briefly considered how this acceleration has taken place since the 1989 UN Convention on the Rights of the Child. From the Cairo and Beijing platforms of action onwards through the UN optional protocols on children in armed conflict and on the sale of children, child prostitution and child pornography, the UN has provided greater legitimacy and impetus for EU action. In addition, the ILO conventions, for example the 1999 Convention on the Worst Forms of Child Labour, also illustrate the RoC cutting across political, civil, economic and social rights in a way that makes it extremely difficult to come to terms with such a complex arena of policy innovation. What we have seen in this chapter is that, from the middle of 2005 onwards, the Commission, in particular under Barroso, took upon itself to push forwards towards a strategy on the RoC, culminating in the 2006 Communication.

We can see some good practices within the EU, including the 1997 and 1999 joint actions and attempts to combat 'child sex tourism'. This follows the UN lead

but puts into place common practices and attempts to encourage member states to prevent child sex tourism. Other examples of good practice would include the 2003 guidelines on children in armed conflicts, obviously influenced by the events in, for instance, Sierra Leone and Uganda. Finally, the Treaty of Lisbon emphasizes in its internal and external objectives that the EU is committed to and will work towards combating social exclusion and discrimination and emphasizes the protection of the rights of the child internally and externally in its relations with the wider world, where the Union shall uphold and promote, in particular, the rights of the child. The final question is whether the EU is being successful in promoting the social dimension of globalization, as seen in this case study of the RoC. While it is too early to judge conclusively, this chapter has illustrated some of the initial steps the EU has taken towards enhanced co-operation and multilateral coherence with the ILO and the UN; towards greater horizontal coherence between different objectives; and towards the achievement of a comprehensive strategy and holistic approach in the promotion of the RoC in the context of the social dimension of globalization.

Looking to the future, the way forward for the EU in promoting the RoC is obviously the Action Plan on Children in External Relations, which is due to promote, from 2008 to 2013, a set of tasks and actions, as well as attempting to copy the perceived mainstreaming of gender through a children's rights toolkit. Undoubtedly, there are questions remaining over whether the EU and its member states are willing to promote the RoC beyond 2008 against considerable resistance, both within and without the Union. In terms of applying the normative power tripartite analytical method, it can be tentatively argued that the EU is now taking steps to promote normative *principles* in line with the UN Convention on the Rights of the Child; it seems committed to promoting normative *actions* by developing a more holistic approach; but it remains to be seen, for example against the achievement of the 2015 MDGs, whether it has a normative *impact* in its international promotion of the rights of the child.

Notes

1 See Regulation 1612/68 of 15 October 1968, OJ L 257; and Regulation 1408/71 of 14 June 1971, OJ L 149.
2 See Case 65/81 *Reina and Reina* [1982] ECR 33; Case 94/84 *Deak* [1985] ECR 1773; Case 7/94 *Lubor Gaal* [1996] ECR 1031; Case 85/98 *Sala* [1998] ECR 2691.
3 The eleven areas are asylum, immigration and external borders; child health, safety and welfare; child poverty and social exclusion; child labour; children's participation; civil justice and family matters; education; environment; media and internet; non-discrimination; and violence against children (including trafficking in children, child sex tourism and paedopornography).
4 Marc Dutroux was convicted of having, in 1995 and 1996, kidnapped, tortured and sexually abused six girls, ranging in age from eight to nineteen years old, four of whom he murdered.
5 *Roper v Simmons* 543 US 551 (2005).
6 The EU Children and Armed Conflict priority countries are Afghanistan, Burma, Burundi, Colombia, the Democratic Republic of Congo, the Ivory Coast, Liberia, Nepal, the Philippines, Somalia, Sri Lanka, Sudan and Uganda.

7 Goals 2, 3 and 4 of the MDGs are to achieve universal primary education, to promote gender equality and empower women and to reduce child mortality.

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